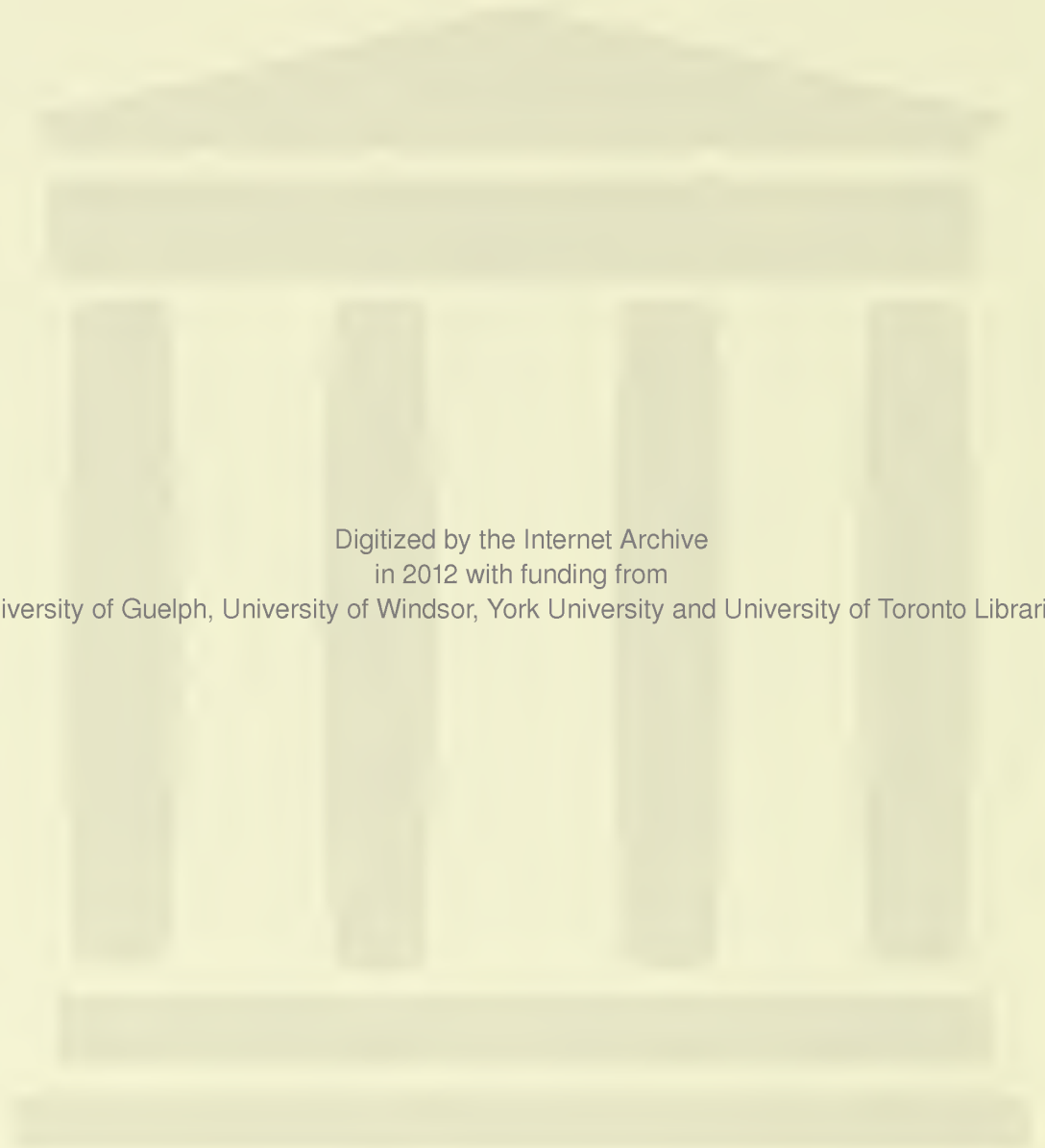
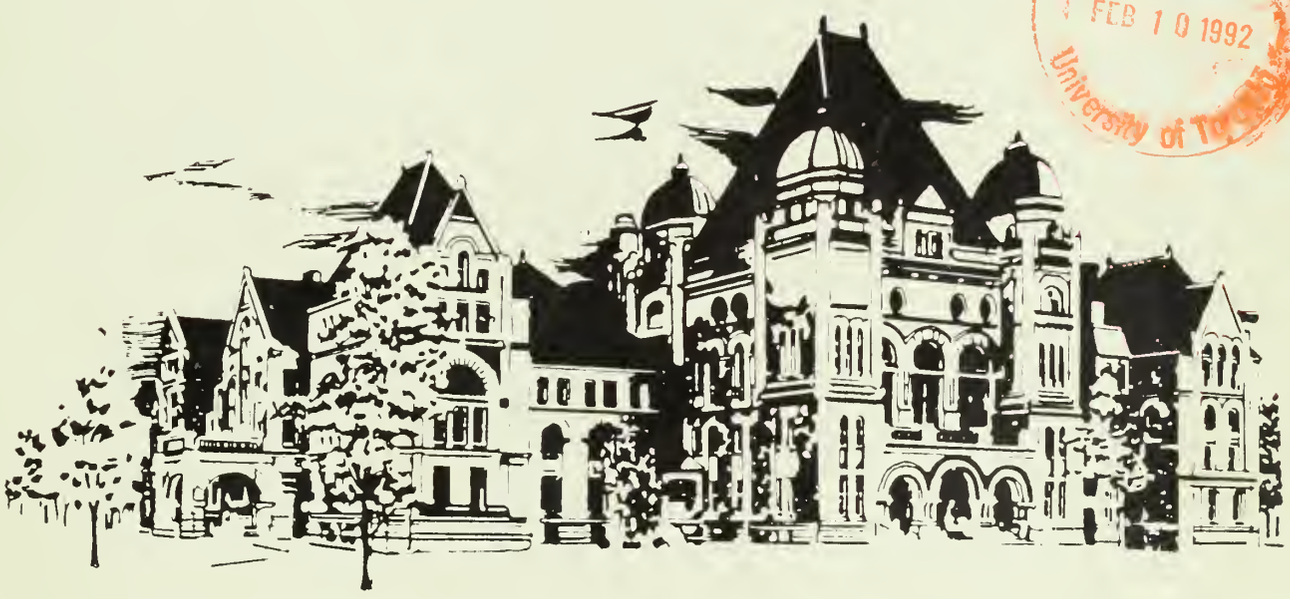


Ontario

FINAL REPORT

SELECT COMMITTEE ON

ONTARIO IN CONFEDERATION



FEBRUARY 1992

1st Session, 35th Parliament
40 Elizabeth II


recycled paper

SELECT COMMITTEE ON
ONTARIO IN CONFEDERATION

COMITÉ SPÉCIAL SUR LE RÔLE DE
L'ONTARIO AU SEIN DE LA CONFÉDÉRATION

(17)

Ontario
LEGISLATIVE ASSEMBLY
ASSEMBLÉE LÉGISLATIVE

TORONTO, ONTARIO
M7A 1A2

The Honourable David Warner, M.P.P.
Speaker of the Legislative Assembly

Sir,

Your Select Committee on Ontario in Confederation has the honour to present its Final Report and requests that it be placed on the Orders and Notices paper for consideration pursuant to Standing Order 36(b).

Dennis Drainville

Dennis Drainville, M.P.P.
Chair

Queen's Park
5 February 1992

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Changes in Committee Membership

15 April 1991	Irene Mathyssen for Marilyn Churley
14 May 1991	Evelyn Gigantes for Fred Wilson (Frontenac-Addington)
3 June 1991	Alvin Curling for Charles Beer
24 September 1991	Dennis Drainville for Tony Silipo
24 September 1991	Jenny Carter for Evelyn Gigantes

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INTRODUCTION

The evolution of the Canadian federation is at a critical cross-roads. The issues currently under debate -- Aboriginal rights, the future of Quebec, the relations between the federal and provincial levels of government, the role of the Constitution in protecting and promoting individual rights and collective values, and in guiding government programs, and the most effective and accountable political institutions -- are crucial to the future shape of the country. Politicians across the country have learned from Meech Lake that the public must be included in this round of constitutional debate. Facilitating public participation has been our overriding goal.

As an original partner in Confederation and as Canada's most populous province, Ontario has a major responsibility to actively participate in the renewal of Canada. In fact, we are the third major Select Committee of the Ontario legislature since 1987 to examine constitutional issues. The Select Committee on Ontario in Confederation was established on December 20, 1990 and consists of 12 Members of the Provincial Parliament from all three parties. Our terms of reference were to review and report on:

- the social and economic interests and aspirations of all people of Ontario within Confederation; and
- what form of Confederation can most effectively meet the social and economic aspirations of the people of Ontario.

To carry out this task we embarked on one of the most extensive consultations with the public of any provincial legislative committee.

Committee Hearings

The first phase of our work was four weeks of public hearings from February 4 to March 1, 1991.

- Altogether, over 600 individuals and groups made presentations in 20 centres across the province. To encourage participation, most hearings took place in community forums held in accessible meeting places. Several were "town hall" style, and in Sioux Lookout a phone-in with Aboriginal communities was conducted in several Native languages. Additional unscheduled witnesses were permitted whenever possible during the meetings, and on several occasions we split into two groups in order to hear more witnesses.

- In addition to these presentations, we received several hundred further written submissions, some of them comprehensive briefs. Large numbers of people responded on a mail-in card contained in the government discussion paper Changing for the Better: An Invitation to Talk about a New Canada and nearly 10,000 calls were made to a toll-free telephone number.

The Committee's March 1991 interim report was based upon this extensive consultation. The report was produced in written, audio and braille forms, in English and in French, and a summary of the interim report was released in 10 languages.

The second phase of hearings, held in July and August, was more focused. Over fifty expert witnesses, community groups and associations responded to a series of questions prepared by the Committee.

The release of the federal government's proposals, Shaping Canada's Future Together, in September was a major juncture in the constitutional process. We organized three weeks of hearings in October and November to quickly gauge initial Ontario reaction to the federal proposals.

Each Committee meeting was televised live by the Ontario parliamentary channel, and was replayed each evening in French on La Chaîne. TVOntario broadcast a daily summary and weekly review of the February hearings. To ensure our proceedings were accessible to Deaf persons, all public hearings provided sign language interpretation and broadcasts on the parliamentary channel were closed-captioned.

Ontario in Confederation Conference

In addition to formal hearings, we also wanted to find new means to consult with Ontarians more directly. The Ontario in Confederation Conference, held October 17-19, 1991, brought a representative group together to discuss constitutional issues in depth. A video of "from the heart" presentations produced from the February hearings kicked off the Conference. To ensure that the women and men attending the Conference reflected the social, cultural, ethnic and regional diversity of Ontario, we consulted advisory councils and community groups to seek suggestions of potential delegates. Each delegate participated in two workshops and was provided with background materials to facilitate discussion.

There were eight workshops on themes that had emerged from our ongoing deliberations: Fundamental Characteristics and Values of Canada; Charter of Rights and Freedoms; Aboriginal Issues; Constitutional Change and the Economy; Quebec's Future in Canada; Division of Powers; National Institutions and the Political System; and Process of Constitutional Reform. Not surprisingly, the federal proposals formed the backdrop for many of the workshop discussions. Summaries of each of these workshops formed the core of the report on the Conference prepared for the Committee. We have carefully studied this report and want to thank again all those who participated. The Conference had extensive media coverage and was televised on the parliamentary network.

Other Jurisdictions

To incorporate a national perspective in Committee deliberations, we wanted to hear first-hand the views of constitutional committees in other provinces and territories. In August, we split into two groups to visit the Western provinces and the two territories, with the exception of Saskatchewan, which did not have a constitutional committee at the time. In November, we again split into two groups to visit the committees of the Atlantic provinces. In a separate trip, we met with representatives of legislative committees in Quebec.

Each trip was a valuable source of knowledge of the pertinent issues and perspectives in other jurisdictions. We have carefully studied the reports issued by several of these provincial and territorial committees. We also had the opportunity to meet with the Special Joint Committee on a Renewed Canada in October.

The Report and Continuing Debate

This report cannot be seen as the last word on all current constitutional issues. We saw listening to the people of Ontario as our key goal; as a result, the scope and detail of the report were largely determined by the issues addressed by the public in our hearings. Each chapter could have easily been the subject of a separate report in itself.

Nor should the overall package of consensus and compromise that emerges over the next few months be seen as the end of constitutional debate and change. Constitution-building is a continuing process and the Constitution must be a living document. Its principles will continue to be debated, and its provisions will continue to evolve in response to changing conditions and needs. We must also remember what a Constitution can and can't do: no matter how coherent or sophisticated the constitutional reforms eventually adopted, they will not solve all the problems and challenges Canadians face.

The next chapter starts with the fundamental values and characteristics that are seen to be vital to Canadian society and the ways in which these values could be reflected in the Constitution.

FUNDAMENTAL CHARACTERISTICS AND VALUES OF CANADIANS

What does it mean to be a Canadian? How can the Constitution help the individuals who live in this country answer this question? Concerned citizens of Ontario, expert witnesses, and delegates to the Conference held by the Committee agreed that the Constitution should address the shared values of Canadians, and should make all Canadians feel included in the national venture. While scores of particular values were named by the hundreds of very diverse people we heard in different places, there was a surprising amount of consensus on the most important of these *values*. These were listed in our interim report as democracy, respect for diversity, and equality. There was less consensus on the fundamental *characteristics* of the country, but some that were mentioned by a number of people were our international reputation, the bilingual and multicultural nature of Canada, a willingness to compromise to resolve conflicts, our social programs, and the Charter of Rights and Freedoms. These values and characteristics are addressed in the remainder of this section, which particularly emphasizes the contributions made by the delegates to our October Conference, and the consensus we saw emerging in both the Conference and our hearings on including a Canada Clause in the Constitution.

Our February hearings discussed values very generally (details may be found in our Interim Report). However, in our second round of summer hearings debate gradually focused on a "Canada Clause." Opinion varied on the form and function of such a clause, but there were certain values which most witnesses agreed should be present. They were: an appropriate (and overdue) recognition of the First Peoples of this country; the historic role of linguistic duality resulting from the settlement of the country by French and English colonists; and the recognition of the role of immigrants from many other countries and cultures in building the country. There was also some agreement on recognition of Quebec's distinct role in preserving a French-speaking society.

The shared values of Ontarians were also the subject of the video which launched the Conference, and of two workshops. As in February, there were some interesting points of consensus. Fundamental *characteristics* of Canada agreed upon by both workshops were:

- the existence of two official languages;
- a democratic parliamentary system; and
- the diversity of our origins.

Fundamental *values* mentioned included:

- respect for the dignity of every person;
- respect for racial, cultural and linguistic diversity;
- fairness;
- equality;
- the well-being of children and commitment to their rights;
- commitment to the protection of the rights, responsibilities, beliefs and values of all provinces, territories and peoples of Canada;
- respect for the natural environment;
- religious freedom;
- linguistic duality; and
- an attitude of inclusion.

Both workshops agreed that enshrining some of these in the Constitution would be of value to Canadians. We respect the consensus among constitutional experts and interested citizens of Ontario that developed during our extensive consultations. We recommend that:

1. ***A Canada Clause should be developed, to be placed in the preamble to the Constitution.***

Respect for Diversity

Both witnesses and Conference delegates stated powerfully that "tolerance" is admirable, but is not a strong enough value for our own era; respect for diversity is a more positive model for creating a modern society in this country. All of the group rights that witnesses agreed should appear in a Canada Clause show respect for diversity of groups; equally, the individual rights enshrined in the Charter allow all Canadians to enjoy the rights and responsibilities of citizenship.

These collective rights derive from Canada's history. The Quebec Act of 1774 was the first official recognition in Canada that the unique society of French-speaking Canadians would not be assimilated into a British way of life, even though it was part of the British Empire. The special relationship of "Indians" with the federal government was recognized in the British North America Act. Finally, s. 27 of the Charter provides that it is to be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

There was agreement at the Conference that Canada is made up of many different cultural groups and is a community of diverse faiths, values, ideologies and cultures. However, neither workshop was able to reach agreement on the idea of three "founding nations" (aboriginal, French and English) or national communities, or how to recognize the contribution of other ethnic groups. There was some discomfort in these workshops and in those on Aboriginal Issues with official recognition of the concept of "founding nations." However, Ontarians believe in respect for diversity, and consequently in certain kinds of constitutional recognition of groups. The traditions of Canada -- parliamentary democracy, coexistence of two language groups within the state, a stable and livable society -- have attracted many people from all over the world.

Our belief in this approach to collective rights has been reinforced in our hearings since February, in which we have heard almost no objection to the recognition of two official languages in Canada. Specifically on the matters addressed by a Canada Clause, there was general agreement that linguistic duality is one of the fundamental characteristics of the country.

Equality

Fairness and equality are agreed to be fundamental values of the Canadian political system; the question is how these values should be enshrined in a preamble to the Constitution. Existing equality rights under the Charter of Rights and Freedoms are discussed in more detail in the next chapter of this report. Any general statement on equality in a Canada Clause must be compatible with, or reinforce, those rights. Historical circumstances have led to recognition of certain groups in the Constitution; barriers to equal participation in society have led to recognition of the needs of other groups. The Charter proactively addresses the latter aspects of equality rights in s. 15(2), which specifically permits programs to ameliorate the conditions of disadvantaged groups.

Social justice and our social programs were addressed as fundamental values of Canada. Discussion of these broad issues in our summer and fall hearings tended to focus on the concept of a Social Charter, particularly after the release of the provincial government's paper on the idea. This concept is examined in the chapter on the Division of Powers.

Democracy

In contrast to our February hearings, the value of democracy was not addressed in great detail by the witnesses we heard, though delegates to the Conference noted it. In some ways this is probably a tribute to the stability of the Canadian state.

One witness argued that democracy means the full, fair and effective participation of all members of society in running that society. This participation, like the implementation of "equality," requires that barriers faced by disadvantaged groups be removed. For example, another witness suggested that the voting rights of homeless people be affirmed. A Canada Clause probably could not address issues at such a detailed level. However, the democratic values mentioned by witnesses and delegates require full access for disadvantaged groups in order to have real meaning. For this reason we believe the value of democracy should be addressed in a very positive way in a Canada Clause.

The Role of Quebec

A detailed discussion of the distinct role of Quebec as the only majority French-speaking society in Canada can be found in the chapter on Quebec. This distinctness has been implicitly recognized in the Constitution, as for example in the recognition of the Civil Code as the law of that province. Witnesses who addressed the issue generally agreed that the unique character of Quebec is a fundamental characteristic of Canada; recognizing this uniqueness should not be seen as dividing the country or the Constitution. As the Premier put it in his speech to our Conference, in a way that has been repeated by other people we have heard from, this recognition takes nothing from us, as Ontarians or Canadians.

Federal Proposals and Hearings

The federal government's discussion of the fundamental values of Canada focuses on a Canada Clause. Its proposals, in Shaping Canada's Future Together, do not suggest wording, but list a series of characteristics of Canada that should be addressed in such a Clause. It will be clear from our final recommendation that we have recognized that the federal proposals identify many important characteristics of the country.

Conclusion

We greatly value the many suggestions made by witnesses, which have helped us to think about what it means to be Canadian. However, we strongly agree with the caution of witnesses before the Committee and delegates to the Conference who said that the Clause should not be a shopping list of acquired rights or a mini-Charter. A "shopping list" of groups and specific protections for those groups carries the danger that important interests will be excluded; we would prefer to strive for a Clause that is as inclusive as possible. At the same time, Canada's history includes a recognition of the rights of linguistic minorities, and the special relationship of the federal Crown with Aboriginal people. More recently, some Canadians have come to feel that recognition of the many cultural backgrounds of the people who have come to Canada must form part of a distinct new Canadian identity. For this reason, we have tried in our suggestions for the Clause to address the unifying values of Canada, and our hopes for our future. All Canadians should be able to see their reflection in this mirror of our soul. We recommend that:

2. ***The Canada Clause should address the values of Canada:***

- ***democratic participation by all Canadians, whatever their race, gender, religion, culture, or physical or mental disability; and concern for the well-being of all Canadians.***

- ***respect for the diversity of individuals, groups and communities; for the special responsibility of the province of Quebec to preserve and promote its distinct society; and for the contribution of people from many cultures and lands to the development of Canada;***

- ***the significance of the First Nations and their long stewardship of this land;***

- ***our historical traditions of a stable British parliamentary democracy, linguistic duality, and recognition and protection of cultural and linguistic minorities; and***

- ***the land itself, and respect for the natural environment.***

CHARTER OF RIGHTS AND FREEDOMS

For our discussion of economic and social rights see the section entitled The Social Charter in the chapter on the Division of Powers.

Introduction

Since its entrenchment in the Constitution in 1982, the Charter of Rights and Freedoms has come to be seen as both an important statement of our values and rights, and as a legal document with the potential to effect progressive change. Participants in our hearings and Conference saw the Charter as an effective mechanism for advancing and protecting the interests of the disadvantaged and addressing important social concerns.

It was equally clear, however, that the existing Charter provisions should not be seen as fixed, but rather as a first step toward the recognition of our important values and rights. Similarly, it is important to evaluate how well the Charter has been achieving its purposes. In this regard, a number of witnesses stated that the Charter as it exists provides the bare minimum of protection. We heard a number of ways in which it could be improved, including proposals with respect to restricting or removing the power of governments to override it, strengthening equality and language rights, and adding other rights such as economic and social rights, and property rights.

We consider a number of these proposals in this chapter. In doing so, we have been hesitant to recommend changes to the Charter. Although we recognize that some witnesses felt strongly that various reforms needed to be adopted, we believe that many of the proposed changes raise complex issues with respect to an area of the law which is still developing. Our approach therefore has been primarily to identify those areas of concern which demand consideration, and to suggest that these matters be considered as part of a more general review of the Charter. It is not our intent that all these issues be addressed in the current constitutional debate.

We believe instead that they should be considered as part of an ongoing review of the Charter. We believe such a review, undertaken by a Committee or Commission knowledgeable in this area, would be the best way to ensure that changes to the Charter are put forward in an effective and comprehensive way.

Before discussing some of the specific proposals put forward, there are a few more general issues which should be addressed. A number of witnesses argued that while the Charter can play a key role in advancing the rights expressed in it, it represents only a partial response to the concerns underlying those rights. The fulfilment of most rights - for example, equality rights - requires action at the more practical level of people's day-to-day existence. Most important for the advancement of these rights are more effective policies with respect to the provision of services, and changes in attitudes. It was noted as well that even at this level a Charter which reflects our important values can assist as an educational tool to advance understanding.

Another general concern we heard from a number of witnesses was that the prohibitive cost involved in prosecuting violations of the Charter makes it effectively unenforceable for many people. We believe that problems in the enforcement of the Charter relate more to general problems in access to our justice system, than to any particular failing in the Charter. Nonetheless, we recognize that these problems are highlighted when they deny people access to important rights, and believe that methods of making the enforcement of the Charter more accessible should be examined as part of a more general review of the Charter.

Finally, an issue which concerns the Charter but which we do not address in this chapter is the proposed inclusion of a clause that would provide in part that courts are to interpret the Charter in a manner consistent with the recognition of Quebec as a distinct society. We recognize the implications of such a provision for the Charter are important, but have chosen to leave our discussion of it to the chapter on Quebec.

Notwithstanding clause

The provision commonly referred to as the "notwithstanding" or "override" clause provides that Parliament or the legislature of a province may enact legislation to operate notwithstanding its impact on a right protected by the Charter. The Charter sets out certain requirements on how this can be exercised, including that it applies only to ss. 2 and 7-15 of the Charter, and that a declaration invoking it ceases to have effect after five years. This ensures that governments using the override must re-enact the legislation regularly, thereby subjecting its use to continuing scrutiny.

Many witnesses who spoke of the importance of the Charter expressed concern at the ability of governments to use the notwithstanding clause to ignore its protections. They suggested that such a provision went against the very idea of protecting fundamental rights. As one witness argued, there is no middle ground between the supremacy of Parliament and the supremacy of the Charter. It was also argued that the Charter provides sufficient scope for courts to take account of government concerns. In light of such considerations, some witnesses argued that the notwithstanding clause should be removed.

On the other hand, other witnesses argued that it may be appropriate to have recourse to this clause in some circumstances. However, these circumstances will be exceptional, and therefore at the very least it should be made more difficult to exercise this power. Suggestions to this end included that a special majority - such as a 66% or 75% vote - be required to pass legislation invoking it; that legislation invoking it be required to be re-enacted every three years instead of every five years, thereby ensuring that its use is reviewed more frequently than at present; and that some rights be removed from its scope of application. In this respect, a number of groups argued that equality rights in particular should not be subject to the notwithstanding clause.

Nonetheless, some witnesses felt that the notwithstanding clause should remain as it stands. It was argued that it was important that governments have the last word on these matters, since as elected representatives they, unlike judges, are accountable to the people for their decisions. A number argued that the notwithstanding clause strikes an effective balance between courts and governments. A few witnesses also noted that retaining the override clause is essential to Quebec's sense of cultural security.

We recognize that even the potential to override the protections offered by the Charter serves to weaken it. However, we believe that there may be limited, though exceptional, circumstances where its use would be appropriate. We believe that the existing requirements for the exercise of the notwithstanding clause come some way to ensuring that this is the case and that it is unnecessary to make it more difficult to exercise.

Nonetheless, we have concerns about the extent to which the public is able to express its views on how the notwithstanding clause is used. We recognize that the five year requirement for re-enactment ensures some degree of continuing public scrutiny. However, we believe that more frequent reviews could ensure greater accountability on the part of governments making use of the clause. We believe a three year period would be appropriate. We recommend that:

3. ***The notwithstanding clause (s. 33) should be amended to provide that a declaration invoking s. 33 ceases to have effect after three years.***

Equality Rights' Guarantees

To those historically excluded from full participation in society, and lacking a powerful voice in the decisions of its government, the Charter offers an opportunity to ensure that their concerns and interests are fairly and adequately addressed.

The terms in which equality rights are guaranteed in the Charter at present are as follows:

> *S. 15 (1)* *Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*
>
> *(2)* *Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*
>
> *S. 27* *This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.*
>
> *S. 28* *Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.*

It was impressed upon us during our consultation process that these rights had been fought for and won with difficulty. As a starting point, a number of groups argued that it was imperative that any changes to the Constitution not weaken these equality guarantees in any way.

A number of witnesses also stressed that our consideration of equality concerns should not be limited to these provisions, but should extend to all aspects of the Constitution and proposed changes to it. Particular concerns mentioned included the notwithstanding clause and the ability of governments to override equality rights. There was also concern about the implications of the entrenchment of property rights for important social measures and legislation. As well, many witnesses expressed concerns about the future of national social programs, and the implications of any changes affecting the federal government's role in developing and funding these programs. Each of these areas is of particular importance to equality-seeking groups. We recognize that respect for equality cannot be limited

to a few provisions in the Charter, but must form part of our consideration of all parts of the Constitution. We are committed to ensuring that these concerns are properly respected and addressed in our deliberations on all proposed changes to the Constitution.

As well as ensuring that equality rights are not eroded, both witnesses and Conference delegates commented on the extent to which the existing equality rights guarantees adequately address the concerns and needs of disadvantaged groups. While we recognize the importance of the concerns raised, we believe that they raise complex issues which could more effectively be addressed as part of the more general review of the Charter we have suggested be undertaken. We believe that the following suggestions are of particular importance and should be considered:

- Whether the Charter should state that the integration of persons with disabilities can best be achieved by their inclusion in the social, political and economic mainstream through the removal of barriers?

- Whether section 15 should be amended to provide that sexual orientation and language are prohibited grounds of discrimination?

- Whether section 27 should be amended to provide that it includes the multiracial, as well as the multicultural, heritage of Canada?

- Whether section 24 should be amended to clarify the remedies available to courts to rectify conditions deemed to be discriminatory or the causes of disadvantage?

A further suggestion, raised in relation to the proposal above concerning the removal of barriers encountered by persons with disabilities, was that the Charter should also provide that governments be required to conduct a "barrier review" every four years. We support the need to examine barriers with a view to ensuring their removal, and would recommend that the government consider options through which the existence of barriers could be periodically reviewed. However, we believe such a review process should not be undertaken within the context of the Charter.

Language Rights

During our initial hearings we heard a great deal about the importance of language rights and services. The range of issues raised included access to services, minority language education rights, and the preservation of heritage languages. As we indicated in our Interim Report, we recognize the importance of each of these concerns.

We have considered a range of proposals affecting these issues. We have heard specific concerns about the treatment of Canada's linguistic minorities in the federal proposal for a distinct society clause. The concern is that the proposed s. 25.1 provides for the "preservation and promotion" of Quebec's distinct society and for only the "preservation" of Canada's linguistic duality. Representatives of Ontario's francophone community told us at the October Conference and in the November hearings that the phrasing should be consistent; some witnesses said the clause should provide for the "preservation, protection and promotion of the existence of communities of French language and culture." We heard similar views in our meeting with the New Brunswick committee. We believe these concerns raise important questions about the effect of this clause, and recommend they be addressed as part of a broader review of the Charter.

Particularly pressing is the whole question of access to services by Deaf persons, persons with communications disabilities (those requiring interpreters or technical devices to communicate) and linguistic minorities. Although responding to these concerns effectively must involve legislative and administrative action at a practical level, we believe there may be ways in which the Charter can also be used.

One suggestion was that it should be possible to interpret the constitutional provisions regarding the English and French languages to include the sign languages of Deaf people. Another suggestion was to extend the right of Deaf persons to the assistance of an interpreter, guaranteed in s. 14 of the Charter, to

all legal proceedings. We note that this guarantee also applies to persons with communications disabilities, as well as linguistic minorities. Any consideration of its extension therefore should also include these individuals. A third suggestion, also referred to in the context of equality rights, was to specifically enumerate "language" as a prohibited ground of discrimination in s. 15 of the Charter. We believe these are important proposals which should be examined as part of the review of the Charter we have suggested.

One suggestion, which we discussed in the context of equality rights, was to require governments to undertake a "barrier review" directed towards ensuring the inclusion of persons with disabilities in the social, political and economic mainstream through the removal of barriers. A particular aspect of such a review could be barriers encountered by Deaf persons and persons with communications disabilities.

Property Rights

An issue which has arisen relatively late in our consultation process is that of entrenching a right to the enjoyment of property. We had heard little in this regard until it was included in the Government of Canada's constitutional proposals. Since that time we have made every attempt to solicit views on the merits and implications of including a right to property in the Charter, raising it in our Conference and hearings, as well as in our meetings with our counterpart committees in other provinces.

At our Conference and in our hearings on the federal proposals, most delegates and witnesses expressed concerns about the uncertainty surrounding such rights and the impact they might have on other important social interests. Particular concern was expressed by a number of groups, including the Aboriginal peoples, about the implications for important social measures and legislation of this proposal. It was in part because of this uncertainty that the Conference delegates

who considered this issue recommended that property rights not be added to the Charter at this time.

In support of a right to property, a number of groups argued that it should provide for due process in any taking away of property rights or limitations on the use of property, and for fair compensation in any deprivation. This right, it was suggested, could be entrenched in s. 7 of the Charter which provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

In response to concerns that valuable legislation could be struck down if challenged under such a provision, it was argued that such legislation would not be endangered if it is well-designed, since the right to property would be subject to reasonable limits (s. 1). As well, it was argued that in the event a court did strike down legislation viewed as important, then the government of the day could always re-enact the legislation invoking the notwithstanding clause (s. 33).

We recognize that a guarantee of property rights in s. 7 of the Charter would be subject to certain safeguards which would help ensure that valuable legislation is not arbitrarily swept aside. However, we believe that at this point the ramifications of including such a right in the Charter are not sufficiently clear to enable us to make a recommendation. We suggest therefore that the possibility of entrenching property rights along the lines discussed above be studied further as part of the more general review of the Charter we have suggested.

We recommend that:

4. *A review of the Charter of Rights and Freedoms should be undertaken with a view to identifying ways in which it could be improved. We believe all aspects of the Charter should be open to review, but recommend in particular that the following matters be examined:*

Accessibility

- *Whether there are methods to make the enforcement of the Charter more accessible?*

Equality Rights' Guarantees

- *Whether the Charter should state that the integration of persons with disabilities can best be achieved by their inclusion in the social, political and economic mainstream through the removal of barriers?*

- *Whether section 15 should be amended to provide that sexual orientation and language are prohibited grounds of discrimination?*

- *Whether section 27 should be amended to provide that it includes the multiracial, as well as the multicultural, heritage of Canada?*

Enforcement

- *Whether section 24 should be amended to clarify the remedies available to courts to rectify conditions deemed to be discriminatory or the causes of disadvantage?*

Language Rights

- *Whether the terms in which it is proposed to recognize Canada's linguistic duality are sufficient?*

- *Whether it should be possible to interpret the constitutional provisions regarding the English and French languages to include the sign languages of Deaf people?*

- *Whether section 14 should be amended to extend the right to the assistance of an interpreter to all legal proceedings?*

Property Rights

- ***Whether section 7 should be amended to include a right to the enjoyment of property?***

5. ***Governments should consider options through which the existence of barriers encountered by persons with disabilities could be periodically reviewed.***

ABORIGINAL ISSUES

Throughout our hearings over the last year, the Committee has recognized the urgency of addressing the constitutional concerns of the Aboriginal people of Canada. We have heard from many Aboriginal people and organizations at each stage of our hearings and during the Conference, from other citizens who support the aspirations of Aboriginal people. We have heard also from our counterparts in other provinces, many of whom share our sense of the central importance of resolving the problems Aboriginal people have with our current constitutional arrangements.

Perspectives on Self-government -- Ontario

The purpose of our summer hearings was to hear more detailed proposals and assessments of constitutional issues; for this reason we invited representatives of various Aboriginal organizations, the province's Native Affairs Secretariat and academics who study Aboriginal issues to speak to us. As in our earlier hearings, Aboriginal self-government was the major topic of discussion, but many other issues were also touched on. These included resources to support self-government, other land and resource issues, the relationship of Aboriginal people with the federal government, the role of the provincial level of government in provision of services, and the role of Aboriginal people in environmental matters.

We were told that there are three basic models for entrenching self-government in the Constitution: the entrenchment of a general clause, on the model of the "peace, order and good government" clause in the Constitution Act, 1867; listing of powers on the models of sections 91 and 92 of the same act; and inclusion of the right in s. 35 of the Constitution Act, 1982, as was attempted in the 1983 to 1987 conferences. Whatever model is eventually used, the feeling, among both Aboriginal organizations and non-Aboriginal witnesses, was that the wording should be as general as possible, and perhaps accompanied by a statement of general principles to guide implementation. There was a strong consensus that the

details of implementation should be worked out by Aboriginal people themselves on a local basis. Many witnesses endorsed the concept of entrenching, or simply formally recognizing the Aboriginal right to self-government. This right is inherent in the fact that Aboriginal people have lived on the land "since time immemorial," . . . "occupying the land in trust for the Creator." By this argument, recognizing this right is not a new departure, because this right was never formally relinquished by Aboriginal people.

There was also a consensus among all witnesses, stronger than we saw in our spring hearings, that the fiduciary or trust relationship and the traditional financial responsibilities of the federal government towards "Indian" communities must continue. One witness also suggested that the relationships among First Nations, federal governments and provincial governments should be monitored by an independent body. Aboriginal organizations also suggested that the federal responsibility for "Indians" should be clearly extended to other Aboriginal people -- non-status Indians, Inuit and Metis people. It was also argued that s. 35 of the Constitution Act, 1982, which recognizes "existing Aboriginal and treaty rights," is too limited, and that a more useful section would result if the word "existing" were removed.

There was strong support for the Ontario government's Statement of Political Relationship, and for a continued involvement of the provincial level of government in service delivery. An issue of great importance to Aboriginal people and provincial governments is the matter of land: resolution of land claims, traditional lands used by Native people, and formal recognition of Aboriginal title. An interesting issue raised, but not pursued in any detail, was the idea that aboriginality itself could create an entitlement to some institutions of self-government. This would address the problem of how to serve Aboriginal people living off-reserve; most proposals for self-government have concentrated on the land base provided by the reserves. Self-government in the urban environment would likely require access to fiscal resources, rather than a land base, to support institutions of self-government. On another matter under

provincial jurisdiction, Ontario's application of fish and game laws to Aboriginal people has been profoundly changed by the Supreme Court's decision in the Sparrow case, which addressed the rights of Aboriginal people to fish and game resources.

Many other issues were raised. Some witnesses said that Aboriginal languages, heritage and culture should be protected in the Constitution. Two constitutional experts also suggested that guaranteed Aboriginal representation in legislatures would respond to some needs of Canada's Aboriginal people. Finally, many witnesses expressed strong support for Aboriginal involvement in the whole process of constitutional negotiations.

Perspectives on Self-government -- Other Provinces and Territories

Because of the diversity of Aboriginal peoples across Canada, and of local responses to the issues, we found our visits to other provinces particularly instructive regarding Aboriginal issues.

The Aboriginal people of the Northwest Territories are very well-represented in their Legislature, and have had a major influence on the position of the Territories in constitutional negotiations on Aboriginal issues. For this reason, we were interested to hear from an Aboriginal member of the Territories' constitutional committee that he also sees an independent and parallel role for Aboriginal people and organizations in the constitutional process. The political power held by Inuit, Dene and other Native citizens of the Territories (the election which resulted in the leadership of Nellie Cournoyea had not yet taken place when we visited) has made for a unique form of government there; their non-partisan legislature and commitment to consensus decision-making owe a great deal to traditional Aboriginal government.

While Yukon Territory does not have a Native majority, it has a substantial and visible Aboriginal population. It was clear from our meetings that events there --

a land claim settlement covering most of the Territory has gone back to the communities for approval -- have made land and land claims issues politically important. Discussions centred on issues of equity (between Aboriginal and non-Aboriginal populations) and how the land settlement will be implemented. People acknowledged that they are not entirely clear on what self-government means, but local conditions lead people to emphasize the eventual land base of the First Nation communities.

Discussions in Alberta were also of great interest to us. While the province has historically resisted entrenchment of an undefined right to Aboriginal self-government, it has been uniquely open to establishing a legally recognized Metis land base. This openness culminated in a package of four laws, passed in 1990 and developed in negotiation with Metis communities, giving land title to those communities. The province has also amended its constitution to recognize the importance of the Metis in developing the province and to protect the land base.

Federal Proposals and Hearings

The federal government's discussion paper addressed a number of the issues of concern to Aboriginal people. It suggests that:

- aboriginal people participate in current constitutional negotiations;
- the Constitution be amended to entrench a general justiciable right to Aboriginal self-government within the Canadian federation and subject to the Canadian Charter of Rights and Freedoms, with the nature of that right described so as to facilitate interpretation of that right by the courts. In order to allow the opportunity to reach agreement, its enforceability would be delayed for a period up to ten years.
- a constitutional process be entrenched to address Aboriginal matters that are not dealt with in the current constitutional deliberations and to monitor progress made in the negotiation of self-government agreements.
- aboriginal representation be guaranteed in a reformed Senate; and
- the Canada Clause recognize that Aboriginal peoples were historically self-governing (see Fundamental Values and Characteristics of Canada).

Many of the witnesses, Aboriginal and non-Aboriginal, who spoke to the Committee on the federal proposals addressed the Aboriginal section. Their reaction to several important aspects of the proposal was universally unfavourable.

The most important of the sections attacked by witnesses was the self-government proposal. Their main concern was with the delay in enforceability of the clause, and the description of the right as a "general justiciable right," rather than an inherent right. The delay was seen as patronizing, and particularly difficult for Aboriginal people, who have had to wait longer and fight harder for proper recognition than most Canadians. Agreement on the other important issue, the recognition of self-government as inherent, was not quite as uniform as the condemnation of the ten-year delay. However, most witnesses were at least open to the idea.

As earlier in the year, there was some discussion of land claims and the establishment of a land base for self-government. However, this issue is not addressed in the federal proposals, and so received less attention than it had earlier. Probably for the same reason, issues of service delivery and the provincial role in Aboriginal matters were not addressed.

In these and earlier hearings, some Aboriginal witnesses also questioned the idea that self-governing Aboriginal institutions should necessarily be subject to the Charter. As the Chiefs of Ontario put it, the provincial level of government in Canada has access to the "notwithstanding clause," and an Aboriginal level of government should have access to the same power. This question has not yet become the subject of much debate, but may in future; the only non-Aboriginal witnesses to discuss it said that self-governing Aboriginal institutions should be subject to the Charter. Our response to the issue is in our recommendations but we would suggest that, to the extent that the Charter reinforces the aspirations of Aboriginal Canadians, it should not be abandoned until it can be replaced by Aboriginal people with instruments that respond to their needs, particularly ensuring the equality and mobility rights of Aboriginal women.

As throughout our hearings, witnesses urged Ontario to take a hard line on Aboriginal issues in constitutional negotiations. The provincial government was urged to align itself with Aboriginal organizations on the self-government issue and to make it a matter of the highest priority in negotiations.

At our October conference, the workshops on Aboriginal issues, like all our hearings, focused on self-government as the most important Aboriginal issue to be addressed in the Constitution. Both sessions agreed that the inherent right to Aboriginal self-government should be entrenched in the Constitution. There was also general agreement that Aboriginal people themselves must define what that will mean to them, probably in a different way for different people. Beyond those two issues, consensus seemed difficult to reach. We heard diverse views within the Aboriginal community during the opening statements made by the Aboriginal participants in one workshop; in particular, the Metis participant said that he felt the federal proposals were a useful starting point for his people, a view not shared by other delegates. Other interesting points were raised, including the idea that the right to self-government should be vested in *people*, and should follow people, rather than being based in particular lands. Conclusions reached by the delegates were:

- The "moratorium" clause in the federal constitutional proposals which places a potential ten-year delay on the entrenchment of self-government should be removed.
- The *inherent* right of Aboriginal peoples to self-government should be recognized immediately.
- The federal proposals should emphasize the *inherent* right to self-government, not that it is justiciable.
- Aboriginal people should themselves define self-government for their own circumstances.

As one delegate noted, the process of recognizing Aboriginal self-government must also force other governments to work with the greatest speed.

There was some agreement that the federal government's fiduciary responsibility for Aboriginal people should be maintained, rather than "Indians" becoming a provincial responsibility. Participants who do not deal with Aboriginal issues in their daily lives agreed with the impassioned statement of one Aboriginal delegate that they, and most other Canadians, have a great deal to learn about these issues.

Conclusion

Aboriginal issues are of the highest priority in this round of constitutional negotiation. This importance has been made clear throughout our hearings, both by the many Aboriginal people we have heard and by the many other Ontarians who have said that this "unfinished business" is of the highest importance to them.

As a Committee of the provincial Legislature, we think it appropriate to address first of all the role of the province and of federal-provincial cooperation in these matters. The province of Ontario is committed to delivering flexible, efficient, effective services to all its citizens, and we are pleased with the efforts of the government of Ontario over the last 25 years to work with our Aboriginal citizens in doing so. Future actions could include, for example, a different school year for Aboriginal students. This could be more easily integrated with the traditional annual cycle of hunting and fishing, and meet the needs of some Aboriginal people in Ontario. Similarly, the province, which as the owner of Crown land bears responsibility for the environment, has a great deal to learn from the original stewards of the land. Appreciation of their stewardship, and the way both Aboriginal and non-Aboriginal witnesses spoke to us about the land, have influenced our approach to the Canada Clause (see the chapter on Fundamental Characteristics and Values). We have heard the many Aboriginal witnesses who spoke of the importance of the land, its resources, and services provided by the province, and we hope that working together on these issues can continue and improve. We recommend that:

6. ***It should be recognized by all parties that access to resources and lands is an integral part of Aboriginal self-government.***

At the same time, we heard from many Aboriginal witnesses over the course of our hearings that they wish to retain their special relationship with the federal Crown. The constitutional, fiduciary responsibility of the federal government for "Indians" has not always benefited Aboriginal people, but they wish to retain that special status. At the same time, we heard from many Aboriginal people, particularly at the Conference, that the legislative expression of that status, the Indian Act, is outdated in both form and content. We have also heard from Aboriginal people living off-reserve, who do not have even the institutional base of the Act, and who wish to be included in the process of constitutional reform along with people who have remained on the reserves. Finally, Native women expressed their wishes that their mobility and equality rights continue to be protected, within the context of Aboriginal self-government. We respect those wishes. We recommend that:

7. ***The fiduciary responsibility of the federal government towards Aboriginal people should be affirmed. As part of this responsibility, we suggest that the Indian Act be revised, as negotiated with the Aboriginal people of Canada.***

8. ***Representative Aboriginal organizations should be recognized as full participants in the constitutional process; Aboriginal people themselves will decide who represents them.***

9. ***We endorse the "parallel process" of constitutional negotiations on Aboriginal issues, which includes formal consultation with urban Aboriginal people, women, youth and Elders.***

The federal proposals are useful in that they have focused constitutional debate on Aboriginal issues; though we strongly disagree with some of them, we find others to be helpful as a starting point. We endorse the federal government's recommendation on Aboriginal participation in current constitutional negotiations.

10. ***We agree with the proposal of the federal government that a constitutional process to address Aboriginal constitutional issues and to monitor other important Aboriginal issues should be entrenched.***

11. We also agree that the importance of the Aboriginal peoples to the identity and development of Canada should be recognized in the Canada Clause (see also Fundamental Characteristics and Values of Canada).

We asked witnesses at both our summer hearings and at the conference whether they want guaranteed Aboriginal representation in legislatures or other important institutions, such as the Supreme Court of Canada. However, we heard no consensus, among Aboriginal or non-Aboriginal people, in their answers. At this time, the highest priority of other Canadians should be to listen to the stated needs of our Aboriginal citizens. At the moment, the recognition of the inherent right to self-government is their highest priority. However, it may be that in the future their needs would be met by greater participation in the institutions which make policy for other Canadians.

On the matter of greatest importance, the constitutional recognition of the inherent right of Aboriginal self-government, we align ourselves with our witnesses and recommend that this be done immediately. At the same time, there are a number of issues that must be addressed before this statement in the Constitution will truly affect the daily lives of Aboriginal people for the better. We recommend that:

12. The inherent right of Aboriginal peoples to self-government within the Canadian constitutional framework should be recognized and this recognition should be entrenched in the Constitution without a deferral period.

Although the Aboriginal constitutional conferences of the 1980s do establish a precedent for trilateral consideration of the issue, they failed to reach agreement on the form and process of entrenchment. This failure suggests that a simple commitment to entrenchment may not be enough. While Aboriginal people must lead in this process, there must be a mechanism to get other parties to the negotiating table. We are particularly impressed by the two-step process recently proposed by Premier Ghiz of Prince Edward Island, in which the inherent right would first of all be constitutionally recognized, then the federal government, provincial governments and Aboriginal peoples would negotiate a National Treaty

of Reconciliation which would elaborate the context for self-government. We recommend that:

13. When Aboriginal people have worked out a definition of self-government, provincial and federal governments must work with them to create a process, including a dispute resolution mechanism, to implement the right. This process could be entrenched in the Constitution.

Finally, it would not benefit anyone for Aboriginal people to be deprived of access to the legal rights of other Canadians during the implementation period. Thus, until there are Aboriginal laws to replace them, we would suggest that federal and provincial laws would continue to be in effect. However, it should be clear that the exercise of self-government requires that, as those Aboriginal laws are developed, they would then replace or operate concurrently with relevant federal or provincial law. We recommend that:

14. Ordinary rights available to other Canadians under the Charter should be available to all Aboriginal people until the process of implementation of self-government is completed.

QUEBEC'S FUTURE IN CANADA

General

Ontarians overwhelmingly want Quebec to stay in Canada, and they support greater recognition and affirmation of the French fact in this country. We believe these views clearly underlay most of the testimony we heard on this issue, from the February hearings to the Ontario in Confederation Conference in October 1991 and the final consultations in November. From our meetings with other provincial and territorial committees, we also feel these views are echoed across the country. This is our fundamental starting point for approaching this chapter.

Throughout our consultations, a recurring theme has been Quebec's sense of grievance with respect to constitutional negotiations. Unfortunately, this has become more pronounced in the last decade. We appreciate that Quebeckers felt excluded from the repatriation of the Constitution in 1981-82, a sentiment that was compounded by a common expectation in the province after the 1980 referendum that their long-felt concerns would be accommodated. This expectation was raised again through the Meech Lake Accord, only to be dashed in the Accord's failure in 1990. We therefore feel strongly that this round of constitutional discussion must, as part of the broader solution to Canada's present impasse, address Quebec's particular needs and aspirations in a positive, practical way.

The Distinct Society

We have found it instructive and reassuring that many Ontarians do not see recognition of Quebec's distinct society as a major break with the past. Indeed, we heard evidence of growing awareness of the long history of Quebec's legal distinctness, which stretches back at least to 1774. That year, in a departure from British colonial practice, the Quebec Act granted the colony the right to preserve the Roman Catholic religion, the seigneurial system and the Civil Code. Ever since, Quebec has been treated somewhat differently from other parts of British North America. Today, our Constitution includes several provisions that apply

only in Quebec or apply in unique ways there, including those regarding the use of French and English, minority education rights, the Civil Code and appointment of judges. Quebec's distinct nature has been acknowledged in other ways, too: by federal statute, three Supreme Court justices must come from Quebec, and the federal government has signed special agreements with Quebec on tax collection, pension plans and immigration.

As our deliberations conclude, we feel a strong sense of support, both in Ontario and across the country, for Quebec's aspirations to be recognized as a distinct society within Canada. The testimony that the Committee has heard indicates that people in our province affirm Quebec's unique role *vis-à-vis* the French language, culture and the other elements of its distinctness. In particular, there seems to be widespread understanding of Quebec's special challenge in North America -- that is, of preserving and enhancing its unique language and culture in the face of a majority anglophone culture. As a Committee, we too recognize this challenge, and are again pleased to report from our various consultations across the country that other Canadians seem to as well.

Accepting the developing broad consensus that a distinct society clause of some type should be included in the Constitution, two issues remain: how should it be worded, and where should it be placed?

The federal proposal on the distinct society responds to both questions. While it is unclear whether the wording of this proposal is acceptable *in detail* across the country, nonetheless it seems to us a valid benchmark for further discussion. We more clearly support the proposal to place reference to Quebec's distinct society both within the Canada Clause and the Charter of Rights. The former recognizes Quebec's identity and role as a basic characteristic of Canada, while the latter affirms that those elements shall be considered in any application of the Charter within Quebec. We appreciate that this second point is fundamental to Quebeckers. Accordingly, we recommend that:

15. ***The distinct society clause as proposed by the federal government (the new section 25.1) should be considered a good basis for further discussion.***

16. ***In order to recognize and affirm Quebec's distinct identity and special role within Canada,***

    - ***a reference to Quebec's distinctness should be included in the proposed Canada Clause; and***

    - ***a distinct society clause should be placed within the Charter of Rights and Freedoms.***

Addressing Quebec's other aspirations

We appreciate that recognition of Quebec's distinct society, while a central issue, will not by itself bring back Quebec to the constitutional fold. Quebec has other traditional concerns, many of which tie closely to the distinct society.

The 1987 Meech Lake Accord was designed largely to address five specific concerns of Quebec, including recognition of the distinct society. One of the other four was that Quebec should be given a larger role in immigration; Quebeckers have said this is vital to protecting and developing their French-speaking society. Despite the failure of the Accord, this concern was addressed through an agreement on immigration in December 1990 between the federal government and Quebec. However, this agreement could be revoked by the federal government. Another issue was that Quebec should have a role in appointments to the Supreme Court of Canada; this is seen as recognizing both Quebec's Civil Code tradition and other concerns about how laws should be interpreted in Quebec. As well, Quebec wanted to limit the use of the federal spending power within areas of exclusive provincial jurisdiction, to afford supreme influence to the provincial government within its borders. Finally, Quebec sought a veto on future constitutional amendments, which it has traditionally claimed by convention.

Several of these concerns are discussed within other chapters of our Report. Addressing immigration and limitations on the federal spending power requires consideration of some broader division of powers issues, which are raised in the next chapter.

Some questions remain: What are the implications of recognition of Quebec as a distinct society for the ways in which powers are divided between the federal government and Quebec? A common interpretation -- and one we support -- is that Quebec would be afforded unique powers to preserve and promote its identity. Therefore, it might be granted more autonomy in immigration and exemption from the federal spending power.

What does this mean for the other provinces, including Ontario? We believe this interpretation does not threaten other provinces, nor indeed would it be unusual in the history of Canadian federalism. Earlier we discussed how the Constitution already recognizes Quebec's distinctness. It also includes provisions that apply specially to other provinces. For example, the clause referring to religious education (s. 93) applies only to Ontario, Quebec and, in a special way, to Newfoundland. In practice, many provinces have arrangements with the federal government that allow them to act flexibly in various areas ranging from the role of the Royal Canadian Mounted Police to tax collection.

Throughout our consultations, from the February hearings to those on the federal proposals in November, the Committee found that Ontarians accept the need for change. In particular, there seems to be considerable support for the idea that Quebec should have greater authority than it now has in those areas crucial to preserving its identity and distinctness. Those areas would most likely include immigration, culture and education, and possibly other specific elements of social and economic policy.

We recognize that Quebec must itself determine in detail which powers are crucial to its special role in Canada. Our concern is to reconcile our desire to address

Quebec's legitimate needs with other principles of our federation, including the importance of a strong federal government. This is the central objective of the next chapter.

DIVISION OF POWERS

Introduction

Recognizing the need for change in response to Quebec's aspirations, the Committee has been obliged, as have all Canadians, to reconsider the proper roles of the federal and provincial governments, and how legislative powers might be redistributed. The following principles have guided our deliberations on this issue:

- Equitable treatment of all provinces. In our hearings across Ontario and consultations outside the province, we were told in clear and forceful terms that any constitutional agreement that does not treat all provinces fairly in response to their unique needs will not be acceptable.

- A strong federal role. There is genuine concern in this province and elsewhere that a general decentralization of powers would gravely threaten the federal government's ability to maintain key national objectives, such as national standards in health care and social programs.

- Effectiveness and efficiency. We have heard repeated concerns about unresponsiveness in government, about overlapping powers between the federal and provincial governments, and about which level of government might carry out particular functions most efficiently. Deficiencies in these areas seem to be reducing the level and quality of services Canadians receive, and increasing the cost of government.

In this chapter, which is perhaps the most complex in our report, we try to address concerns that have been raised about these three principles.

First, we discuss how Quebec's aspirations square with the first two objectives; we canvass various proposals to reconcile these principles and indicate our support for greater flexibility in the Constitution to achieve this. Second, we address concerns we have heard about the third principle above, and recommend a general review of the division of powers to examine which specific powers might be reassigned.

Then we examine how any reordering of powers might affect the national character of social programs, and propose a Social Charter as a mechanism to reinforce governmental commitments to minimum national standards. And finally, we discuss federal and provincial roles in reducing economic and employment barriers between provinces and other measures to strengthen the economic union; here we advise that consideration of such economic measures be removed from the constitutional agenda and dealt with -- as a priority -- through intergovernmental discussions.

Addressing basic principles

Provincial equitability and the role of the federal government

An important question raised by devolving additional powers to Quebec, and which prompted much debate, was whether any powers devolved to Quebec should be given or made available to other provinces. One response we heard was that formal provincial equality requires that each province have the same areas of authority. However, it was also argued that true equality, or equitable treatment of the provinces, requires treating different provinces differently. The devolution of power to Quebec would be a response to its particular needs, and unless these needs were shared by other provinces, equitability would not demand that they be given those precise powers.

The historical evolution of our federation supports this latter interpretation. We believe flexibility and willingness to compromise in response to provincial needs have been hallmarks of government in Canada. Part of this tradition, of course, is respect for the integrity of each province. We believe therefore that the provinces themselves should determine whether to exercise powers offered to any other province. From this approach we would accept, and fully expect, an asymmetrical and flexible reordering of powers, according to the individual and varying needs of all provinces.

We recognize, as did several witnesses, that if all provinces exercise all the powers granted to Quebec the result may be a highly decentralized federation. Among other things, this could endanger the national character of social programs. One way to avoid this, according to some witnesses, would be to devolve powers only to Quebec to meet its special needs, and not to the other provinces, thus ensuring the continuation of a strong central government. However, mindful of the need to treat all provinces equitably, we propose instead to examine various models put forward in the hearings that could make powers available to all provinces with greater flexibility and at the same time provide possible safeguards against massive decentralization. Some of these are:

- a constitutional amendment providing for the delegation of powers between Parliament and legislatures;
- a constitutional amendment to make powers available to Quebec and other provinces under the formula of concurrence with provincial or federal paramountcy;
- a constitutional amendment to provide for the entrenchment in the Constitution, where appropriate, of bilateral agreements between governments; and
- use of opting in or out with respect to national shared-cost programs.

We find great merit in these ideas and in the flexible approach to the division of powers they all follow. In doing so, we recall that many Ontarians have told us Canada's history provides numerous examples of flexible arrangements (discussed in the last chapter) between the federal government and the provinces, especially -- though not only -- regarding Quebec. We also heard considerable support for extending this flexible approach to resolving the dilemmas Canada now faces.

Because these concepts may be unfamiliar to many Ontarians, some discussion is useful.

Legislative Delegation

At present the Constitution does not permit one level of government to delegate to another level of government its legislative authority over a particular matter. Permitting governments to do so would have two advantages. First, it would enable governments to transfer authority to a level which might be better able to respond to a particular matter, as may be required over time. Second, it would address the conundrum presented by Quebec's desire for greater autonomy, the desire elsewhere to maintain a relatively centralized federation, and the need to treat all provinces equitably. The federal government could delegate powers to all provinces, including Quebec; however, many other provinces -- perhaps most -- would choose not to exercise their authority, thereby leaving more effective power to the federal government.

We have several concerns about this approach. One is that it may lead, through a series of bilateral agreements, to an uneven patchwork of structures and regulations. Another concern is that unrestricted use of this power could permit the federal government to delegate its powers in areas which Canadians may believe are more properly federal powers, such as national social programs or the environment. Two other issues relate to the specific design of this provision. First, should the fiscal resources needed to administer the delegated power automatically be provided? And second, should the government delegating the power be able to revoke it unilaterally?

We would want these matters addressed before we could support any specific proposal to include a provision in the Constitution permitting the delegation of powers.

Expanded Use of Concurrent Powers

The concept of concurrency of powers is that both levels of government have authority over the matter in question. This enables governments to work out

between themselves the appropriate distribution of authority. In the event of disagreement or if inconsistent laws are passed by those governments, the Constitution identifies whose authority or laws are paramount.

Only immigration, agriculture and pensions are concurrent powers at present; the first two have federal paramountcy and the latter provincial paramountcy. Witnesses suggested that declaring more exclusive federal powers to be concurrent would enable governments to administer their powers more effectively. The approach also has similar advantages to legislative delegation in terms of providing flexibility while treating all provinces equitably. However, it may likewise lead to general decentralization.

Accordingly, we believe any discussion about which powers might be made concurrent should consider whether certain powers, such as those relating to national social programs or the environment, might best be declared under federal paramountcy.

Entrenchment of Bilateral Federal-Provincial Agreements

Agreements between the federal government and single provinces have always played an important role in the day-to-day administration of governmental powers. In the future, we may need to find new ways to make better use of these bilateral agreements and raise their profile. One suggestion was to include them in the Constitution. This approach would make the Constitution more flexible by avoiding strict delineation of authority. It would also provide greater security for participating provinces by ensuring the federal government could no longer unilaterally revoke an agreement. An example is found in the federal proposals, which suggest a willingness to negotiate agreements in areas such as immigration and culture, and to constitutionalize these agreements where appropriate.

We recommend that mechanisms for entrenching and later amending bilateral agreements be examined. Such mechanisms should be flexible and respect the

cooperative nature of such agreements. These considerations should require, for example, the consent of both governments to amend an agreement.

Use of the Opting In or Opting Out Provision

Opting out is now familiar to many Canadians in the context of national shared-cost programs. These programs operate on the basis that the federal government decides on the program, and then proposes it to the provinces as a joint venture in which the cost is split. Funds are transferred to the provinces to be used for this purpose. A province can "opt out" of the program but will not receive the federal money targeted for the program unless it agrees to continue or establish a comparable program. If it decides not to participate at all, it would not receive any federal tax dollars for the program. (This is discussed in greater detail later in this chapter under National Standards in Social Programs.)

Since the Constitution Act, 1982, opting out is also available at the constitutional level. An amendment that takes away from the powers of a province would require consent under the Act's 7/50 formula (Parliament and seven legislatures representing 50% of the population of all the provinces); however, a dissenting province could opt out of the amendment so it would not apply in that province. A related mechanism is "opting in," which can be used to offer individual provinces the choice of recognizing a potential uniform law or standard. This model is contained in s. 94 of the Constitution Act, 1867, which refers to providing uniform laws relative to property and civil rights and civil procedure.

While we have some concerns that extensive use of these techniques would lead to a decentralized federation with a patchwork of differing regulations, we recommend their use be explored along with the other mechanisms dealing with the division of powers.

Division of Powers' Review

Many witnesses identified problems in the way powers are allocated and administered under the existing division of powers. These included:

- unnecessary overlap in jurisdictions and duplication in the provision of government services;
- a failure on the part of governments to work together in administering powers;
- avoidance of responsibility or "buck-passing" on the part of governments; and
- a distribution of authority which does not reflect the appropriate roles of governments today.

Although witnesses did not generally provide specific areas in which these problems were present, we accept that these concerns are well-founded and should be addressed.

To adequately address these concerns we believe a detailed review of the division of powers, and the manner in which powers are administered, should be undertaken. Such a review should have two primary purposes. The first would be to identify areas of overlap and duplication in the administration of powers. This should also identify gaps or areas of confusion over who has authority. We note that the federal proposals indicate some areas in which improvements could be made and suggest a process of intergovernmental negotiation on appropriate changes in the provision of services. We believe such a process would be useful and would follow naturally from the review we have suggested.

A second purpose would be to identify areas of authority in which a different level of government might more effectively administer a power. This might require, for example, that the federal government retain those powers which have a national dimension if national regulation is the only effective approach. On the other hand, this consideration may require a reallocation of powers to recognize

the needs and circumstances of particular provinces, if, for example, national regulation would not be responsive to local needs. In this respect, a particular matter we discussed earlier was determining the powers to be devolved to Quebec to respond to its unique regional needs. Of course, some matters may have both elements. For example, a policy may concern a matter with a national dimension and at the same time be tailored to the needs of a particular province. We believe, in fact, that shared jurisdiction will be an appropriate solution in many circumstances. We note that the federal proposals recommend a number of areas in which it would be more appropriate for the provinces to exercise authority currently administered by the federal government. These areas should be closely examined as part of any review.

In undertaking this review, one consideration will be whether each power affected should be devolved to all provinces or whether it would be appropriate, given the above principles, to devolve some powers more flexibly. In our hearings, there was disagreement on this matter. We have indicated earlier that in most instances the option of devolving power flexibly should be available.

Reallocating powers or responsibilities to the provinces will require those governments to expend greater resources. We note that in the federal proposals no mention is made of providing the provinces with greater resources in this regard. Witnesses in our hearings, Conference delegates and other provincial committees have all recognized this problem. We believe any reallocation of powers must address this concern.

Finally, we wish to comment on several specific powers, without in any sense defining the final list of powers to be considered for review. First, we propose that the following powers, which have been highlighted in a variety of recent constitutional proposals, might be included in a review: culture, language, immigration, environment, manpower training, unemployment insurance, education and health care. At the same time, we wish to indicate examples of the areas we believe are essential to the effective functioning of a federal government:

defence, customs, currency and public debt, equalization, foreign policy, and the post office and telecommunications. As well, we believe the federal government should have some role in several important powers, including: culture, environment, fisheries, immigration, justice, native affairs, and taxation and revenue.

Conclusion

In summary, we believe a detailed review of the division of powers and a creative combination of the specific mechanisms discussed above would accommodate the three principles set out at the beginning of this chapter. These options present a degree of flexibility that would be useful in responding to the current constitutional discussion and to changing needs over time.

In particular, we feel the idea of declaring more exclusive federal fields to be concurrent powers, with either the federal or provincial level declared as paramount, fits clearly within the Canadian tradition of cooperation and interdependence. We would support a proposal that a number of new specific powers which Quebec requests to address its special role in Canada should be declared concurrent with provincial paramountcy. For other powers that are declared concurrent, the issues of paramountcy and the precise division of authority would be determined through the review process discussed above, and through ongoing intergovernmental negotiation.

Finally, we recognize that this mechanism, and the others discussed above, could have a substantial decentralizing effect if used in an unrestricted manner. For this reason, we believe safeguards should be considered in the design of these mechanisms so as not to undermine the ability of the federal government to ensure the achievement of important national objectives. We recommend that:

17. A review of the existing division of powers should be undertaken with the following purposes:

- *To identify areas of overlap and duplication in the administration of powers. This part of the review should also identify gaps or areas in which there is some confusion over who has authority.*

- *To identify areas of authority in which a different level of government might more effectively administer a power. Any transfer of authority in response to provincial needs must be accompanied by adequate fiscal resources.*

18. Powers should be redistributed in a flexible manner to address the important objectives of affirming the equitable treatment of all provinces, accommodating Quebec's needs to preserve and promote its distinct society, and maintaining a role for a strong federal government.

19. Specific mechanisms to reassign powers flexibly should be studied further. These mechanisms would include legislative delegation, making more powers concurrent with provincial or federal paramountcy, including certain bilateral agreements between governments in the Constitution, and the use of opting in or out of national shared-cost programs.

National Standards in Social Programs

Throughout our consultation process, the need to ensure the continued maintenance of adequate national standards in social programs was stressed. Many witnesses argued that the effective continuation of these vital health, education and social security programs was dependent on the federal government playing a strong role in developing and funding them. We explore two related issues in this section: proposed restrictions on the federal spending power, and the use of a Social Charter to ensure the continued maintenance and development of social programs.

Shared-cost Programs and the Federal Spending Power

Shared-cost programs are developed through agreement between the federal and provincial governments, and have traditionally involved the two levels of government sharing the cost. At present, two of the most significant are Established Programs Financing, through which the federal government contributes to the financing of health care and post-secondary education, and the Canada Assistance Plan, through which the federal government funds a number of programs related to income security. It is generally a condition of the federal contribution that the receiving province either implement the proposed program or one which is comparable. A decision by a province not to participate at all will result in it not receiving the federal contribution, with the result that the residents of that province will effectively subsidize the programs in other participating provinces. This arrangement, and the fiscal pressures and incentives it puts on provinces, enables the federal government to ensure national participation in what are seen to be fundamental programs.

The obvious benefit of this arrangement is that it ensures that relatively consistent standards are achieved across the country. As well, the federal government's contribution also tends to have an equalizing effect for the poorer provinces. In combination with formal equalization payments, it ensures that all provinces are able to provide comparable levels of services at comparable levels of taxation. However, this arrangement is also criticized as being intrusive, as health care, education and income security are matters within exclusive provincial jurisdiction. The federal government has no express authority to regulate these matters but has been able to shape these programs through its power to spend money raised through its taxing power, and as part of its control over "the public debt and property." This "spending power" is not expressed in the Constitution but has been inferred. It has also been argued that the federal government's involvement in these matters gives rise to duplication and inefficiency.

The Meech Lake Accord, and more recently the current federal proposals, have recommended placing restrictions on the use that could be made by the federal government of its spending power in areas of provincial jurisdiction. The federal government has proposed that it would agree not to introduce new Canada-wide shared-cost programs and conditional transfers in areas of exclusive provincial jurisdiction without the approval of at least seven provinces representing 50% of the population. If a province chooses not to participate but establishes its own program which meets the objectives of the new program, then it would receive reasonable compensation. This provision would be entrenched in the Constitution. Arrangements in place with respect to existing programs would be unaffected.

This proposal would give provinces more say in the development of new programs at the initial stages. It would also permit them more flexibility in the design and implementation of their own programs if they opt out, since they would no longer have to establish a comparable program, only a program which meets the objectives of the proposed program. At the same time, by requiring provincial programs to meet the objectives of the Canada-wide program, the federal government would retain significant control over the development of policies in these areas and therefore over program standards and quality.

One concern we have with the existing proposal is that it does not include any restrictions on the power of the federal government to make changes to existing agreements. We believe there is the same need for greater provincial input into and control over decisions to make changes to existing shared-cost programs as there is for the creation of new programs.

Nonetheless, we believe that the federal government's role in the development of crucial social programs is important and should be continued. At the same time, however, we believe that the federal proposal provides provinces with greater flexibility than exists at present. By introducing this flexibility, while retaining the federal government's important guiding role, we believe the proposal strikes an effective balance. We recommend that:

20. ***The federal government should exercise its spending power in areas of provincial jurisdiction within the following framework:***

- ***The federal government should not introduce new Canada-wide shared-cost programs and conditional transfers in areas of exclusive provincial jurisdiction, without the approval of at least seven provinces representing 50% of the population. The same restrictions should apply to the introduction of changes to existing shared-cost programs.***

- ***If a province chooses not to participate but establishes its own program which meets the objectives of the new program or the changes to a program, then it should receive reasonable compensation.***

- ***This provision should be entrenched in the Constitution.***

A Social Charter

The concerns raised about the possible deterioration of social programs have caused many people to look for new ways to ensure their protection. One option put forward has been the entrenchment of a Social Charter in the Constitution which would provide for the protection of economic and social interests; for example, programs and services related to health, education, social security, adequate housing, and an adequate standard of living. The goal would be to ensure the continued maintenance and development of our tradition of national standards in social programs. This concept could take a number of different forms, some of which are presented and elaborated on by the Ontario government in its discussion paper, A Canadian Social Charter: Making Our Shared Values Stronger. In light of these developments, we attempted, in our ongoing consultation process, to examine more closely the possible role a Social Charter might play in responding to the desires of Canadians, the form it might take, and how it could best be enforced.

We heard from a number of witnesses during our August hearings, as well as from Conference delegates, on these issues. Many witnesses favoured including economic and social rights in the Charter of Rights and Freedoms, reasoning that

because they are of equal importance to those rights presently guaranteed they should be enforced in the same way. However, others argued that economic and social rights were of a different character than individual rights and were not appropriate for the courts to enforce. In particular, it would involve courts too directly in setting government policy and spending priorities, matters over which they lack expertise and the political accountability to make decisions. A related option would be to provide for judicial enforcement of the commitment of the federal government in s. 36 to make equalization payments, or of a commitment on the part of governments to provide comparable levels of social programs.

Rather than judicial enforcement, some witnesses suggested that there be a specific body responsible for implementing these social and economic rights and that it should also monitor and report on the progress made by governments in achieving them. Such a review could be undertaken on a regular basis, or with respect to particular legislation which might impact upon the principles set out in a Social Charter. For example, decisions by governments to vary the terms of agreements, such as the federal government's recent reduction of its contributions to Established Programs Financing and the Canada Assistance Plan, might be subject to review. The primary force of such a review would be to bring moral and political pressure to bear on the government in question to account for its position. Suggestions as to the institution that should perform these functions include: a reformed Senate; an appointed body of federal and provincial governmental representatives, acting free from government supervision; a form of administrative tribunal; and an economic and social rights Ombudsman.

A Social Charter along these lines could be incorporated in the Constitution either independent of existing provisions or by building upon s. 36 of the Constitution Act, 1982, which already commits governments to promoting equal opportunities for the well-being of Canadians, to reducing regional disparities, and to providing essential public services of reasonable quality.

We believe there is broad support for the concept of more fully protecting economic and social interests in the Constitution, and that the object of that protection should be the continued maintenance and development of our important national social programs. In this respect, we agree with those witnesses who argued that a Social Charter should buttress existing programs and not be seen as a replacement for the federal-provincial arrangements responsible for the funding and design of those programs. It should do this by providing a formalized, but flexible, mechanism to ensure that these programs, and the interests they advance, are not altered without a process of consultation and consideration reflective of their importance. A Social Charter of this nature would also provide an important complement to changes in the economic union directed toward a more flexible movement of people, goods, capital and services.

Determining the form and content of a Social Charter requires a more detailed review than we can provide here. Nonetheless, we believe we should provide some direction in this regard. A Social Charter could define fundamental services in relation to matters such as health, education and social security. It might also cover services and programs with respect to the health and security of children in particular, as well as the environment and housing. The Social Charter might also contain a requirement that people be entitled to receive these services if they move to or visit another province, without having to satisfy special requirements. As a number of witnesses have suggested, a Social Charter of this nature could build on the principles found in s. 36 of the Constitution Act, 1982.

We have considered the possibility of judicial enforcement of these rights. We recognize that judicially enforced rights would provide a powerful mechanism to ensure that governments are held accountable for their actions. However, we believe judicial procedures are not well-suited to the systematic, broad-based review required in these circumstances. We therefore believe that most of the rights in question should not be judicially enforced.

We believe instead that the principles of a Social Charter could be monitored by a joint standing committee of the House of Commons and a reformed second chamber (the creation of this committee is discussed in the chapter on National Institutions). This body could be directed to review proposed legislation or agreements or changes to existing agreements, and to conduct systematic reviews of the adherence of governments to the principles of a Social Charter. Such reviews should take a long-term view of social and economic needs, and be undertaken in consultation with a broad range of interests.

We believe that adherence to a Social Charter would rely primarily on the moral and political pressure resulting from the public scrutiny of government policies which this review process would provide. However, options for implementing and enforcing a Social Charter should be further explored. We recommend that:

21. The concept of a Social Charter should be embodied in an expanded s. 36 of the Constitution Act, 1982 in the following terms:

- *It should build on the principles found in s. 36, and uphold national standards and equitable access to programs involving but not limited to health care, education, social security and the environment;*

- *Its role should be to ensure the continued maintenance and development of our tradition of national standards in social programs.*

- *The principles of an expanded s. 36 could be monitored by a standing joint committee of the second chamber and House of Commons. This body could review proposed legislation or agreements or changes to existing agreements. It could also conduct systematic reviews of the adherence of governments to those principles.*

- *Adherence to an expanded s. 36 would primarily rely on the moral and political pressure which would result from the public scrutiny of government policies this review process would provide. However, the options for implementing and enforcing an expanded s. 36 should be further explored. The provisions of an expanded s. 36 should not be judicially enforceable.*

Division of Powers and the Economy

Through our hearings and consultations, the Committee has become greatly aware of how worried Ontarians are about the sorry state of the economy, in particular about the lingering recession and the impact of the Canada-U.S. Free Trade Agreement on our province's manufacturing sector. Although we have heard little detail about how constitutional reform might directly aid the economy, various witnesses have emphasized the importance of an effective economic union to building a prosperous, competitive country. However, witnesses disagreed -- or were unclear -- about how the economic union might best be strengthened, including the proper roles for the federal and provincial governments.

As indicated in the Committee's Interim Report, witnesses in the February-March hearings tended to discuss the economy in very general terms. For instance, while many said interprovincial trade and employment barriers should be removed, few indicated how or when this should be done. Similarly, some witnesses urged the Ontario government to pursue links with the European Community to take advantage of its expected growth, without saying how this might actually be achieved.

At our summer hearings, the expert witnesses generally provided more detail. Some said strong federal legislative powers are needed to maintain the economic union, including overseeing nation-wide business regulations and standards for social programs. Others said economic coordination and harmonization should be negotiated among the provinces rather than imposed by the federal government; this might include a role for permanent federal-provincial agencies to oversee the coordination process. The witnesses all seemed to agree, nonetheless, that barriers should be removed between provinces, and harmonization encouraged.

Similar opinions emerged at workshops at the Committee's Conference in October, although some delegates expressed concern about the effects on vulnerable industries of eliminating trade barriers. Some also stressed that

measures to strengthen the economic union should be balanced with a Social Charter or statement of social objectives that would articulate the basic quality of life all Canadians can expect. The latter concept would provide some bottom-line protection to workers in threatened industries, and also work against a general decline in social programs as individual provinces seek ways to attract outside investment and commercial development.

Since September, the federal proposals on the economy have provided some focus for comments on this topic, and considerable detail. As part of its plan to strengthen the economic union, the government proposes to broaden s. 121 of the Constitution Act, 1867 (the so-called common market clause) to guarantee the free movement of "persons, goods, services and capital . . . without barriers or restrictions based on provincial or territorial boundaries." The proposal allows for certain exceptions, including national and provincial equalization/regional development programs and matters declared by Parliament to be "in the national interest" (and ratified by seven provinces representing 50% of the population). The federal government also proposes that it be afforded a new power under a proposed s. 91A to "manage the economic union", again subject to provincial ratification through a new body, known as the Council of the Federation, which would consist of representatives of the federal, provincial and territorial governments.

Besides some brief comments at the Conference, we heard testimony on these proposals in our hearings on the federal paper in November 1991. All witnesses who addressed broadening s. 121 generally supported it, although several reiterated the need to allow for exceptions so that effective equalization and regional development programs could continue. However, most, including those who supported broadening s. 121, opposed other aspects of the federal government's proposals to strengthen the economic union. Witnesses were divided on the Council of the Federation concept. We found it noteworthy that several witnesses said these economic proposals should not be entrenched in the Constitution, or at least should not be on the agenda at this time.

The federal proposals on the economic union were discussed in only two meetings between the Committee and counterpart committees in other provinces, and opinion about them was mixed and preliminary. We therefore find it difficult to assess the reaction across the country to the proposals.

In view of the scant direct commentary that the Committee has heard on the economic aspects of the federal proposals -- just eight witnesses -- it would be premature to issue a detailed response. We generally support the call to reduce interprovincial economic barriers. In doing so, we recognize that while a stronger economic union will greatly assist in building a prosperous, competitive economy, it may also put downward pressure on social programs; this pressure can best be resisted both through the political process and the entrenchment of a Social Charter concept (discussed above in this chapter).

We also appreciate that support for reducing interprovincial trade barriers is insufficient by itself. To turn the principle into reality, we need a mechanism that is legitimate, effective and widely accepted. We note with great interest recent interprovincial efforts, especially in Atlantic Canada, to reach meaningful agreements to reduce economic barriers. Our proposal for a reformed second chamber (discussed in the chapter on National Institutions) may provide an appropriate model for a dispute-resolution agency. However, while pursuit of such a mechanism remains important to Canada's future prosperity, we are not convinced it should be part of the constitutional agenda at this time. Accordingly we recommend that:

22. ***We support in principle efforts to reduce trade and other economic barriers within Canada.***

23. ***The government of Ontario, in concert with other provinces and the federal government, should study further the details of the federal proposals regarding the economic union, seeking to clarify, negotiate and implement some of these measures through sub-constitutional means.***

NATIONAL INSTITUTIONS AND THE POLITICAL SYSTEM

In our previous chapter, we discussed the roles of the federal and provincial governments. A constitution, however, must also define the principal institutions of government. The reform of two national institutions -- the Senate and the Supreme Court of Canada -- as well as of the electoral system and the political process form the focus of this chapter. In analyzing such reform, we have emphasized the goals of representativeness and responsiveness.

Reform of Parliament's Second Chamber

Purposes of Reform

During our entire consultation process, whether it be the hearings in Ontario, the meetings in other jurisdictions, or the Conference workshops, there was virtually unanimous agreement that the Senate cannot continue in its current form. Numerous criticisms were voiced to the Committee. They focused on, but were not limited to, the Senate's lack of democratic legitimacy as an appointed body and its inability to perform effectively what seems to have been its most important original purpose -- the representation of regional interests in national decision-making.*

The near-unanimous disenchantment with the Senate was not matched with any consensus on how to reform this body. Some witnesses and Conference delegates, for instance, preferred outright abolition. They contended that parliamentary government does not require two houses. Indeed, the provinces that once had upper houses have long since abolished them.

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* Unless otherwise indicated, the word "region" is used in this chapter in a general way to denote a geographical area. Thus, "regional" interests could refer to the interests of a specific province or group of provinces.

Proponents of abolition, however, were not uniform in their recommendations. One witness, for example, favoured abolition but in conjunction with reforms to the House of Commons. Under this proposal, a limited number of MPs, elected by proportional representation, would reflect regional concerns within each party's caucus. These MPs would join the MPs elected under the current "first-past-the-post" system in the House of Commons.

In assessing the abolition argument, a question we have had to wrestle with is the consequences of a one chamber Parliament. More particularly, in the absence of complementary reforms such as the one just described, would abolition mean there would be no mechanisms to promote regional accommodation? Certainly various constitutional, parliamentary, and intergovernmental mechanisms do exist for the expression of regional concerns. Illustrations cited in a government discussion paper filed with the Committee (and the list is by no means exhaustive) include: the constitutional division of powers whereby decisions in areas of provincial jurisdiction are to be made by provincial rather than national majorities; First Ministers' Conferences; intergovernmental contacts and negotiations at ministerial and bureaucratic levels; regional balance in appointments to the Supreme Court of Canada (see "Supreme Court of Canada" below); the tradition of powerful regional spokespersons in the federal Cabinet; and the advocacy of regional interests within the party system in Parliament.

But notwithstanding such mechanisms, we do not consider abolition to be a practical or realistic option at this time. In virtually every federation, apart from the existence of two levels of government, there is some central institution that provides for the expression of regional and minority concerns and their accommodation in national decision-making -- that is, the federal legislature contains a second chamber reflecting the principle of representation based on region. In Canada the Senate was supposed to be that chamber. (The other chamber, the House of Commons, is intended to reflect the principle of representation based on population.)

It is also the Committee's view that abolition is not realistic from a national perspective. Senate reform was not a high priority for Ontarians during our hearings. But we are well aware, especially after our meetings in the Western and Atlantic provinces and in the North, that reform is seen by many outside Central Canada as essential if provincial and territorial voices are to be heard in any meaningful way in Ottawa. We heard of a desire for fairness; this desire was expressed as a wish not to always win against or even oppose Central Canada, but only to be heard with some real chance of having influence in national policy. Mechanisms, such as those described above, are not seen as compensating satisfactorily for the inadequacies of the existing Senate in this area.

We accordingly see a reformed second chamber as performing a role in the representation of provincial and territorial interests. At the same time, we wish to point out that some witnesses and Conference delegates felt that the concept of representation based on geographic criteria, whether they be provinces, territories, or regions, had to be rethought. In particular, they wished to extend that representational role to encompass what some termed "communities of interest" -- women, Aboriginal peoples, linguistic minorities, persons with disabilities, visible minorities, and ethnocultural groups. Whether or not the second chamber should perform this kind of function requires further study. There is also the question as to how, on a practical level, such representation might be achieved. It should be noted that the issue of guaranteed Aboriginal representation in legislatures was discussed earlier in this report.

Apart from its representational functions, the Senate was designed to be a chamber of "sober second thought" and act as a counterweight to the popularly-elected House of Commons. Senators, for instance, were to be appointed, not elected, and had to be at least thirty years of age. This role received little support during our consultation process. It is not one which we would assign to a new second chamber.

Another original purpose of the Senate which we reject for the new chamber is that of protecting property interests. Sir John A. Macdonald believed that "a large qualification should be necessary for membership of the Upper House, in order to represent the principle of property." He continued that "the rights of the minority must be protected, and the rich are always fewer in number than the poor." Each Senator was required to own real property with a net value of $4,000 in the province to be represented. In addition, the Senator had to be worth $4,000 over and above all liabilities. These archaic property qualifications have never been changed and must be removed.

Structure and Operation of a New Second Chamber

Selection

By far, most proponents of reform favoured an elected second chamber. As pointed out in our Interim Report, some went further and endorsed the Triple-E concept, proposing a chamber (1) that is *elected* directly by the people; (2) where there is *equal* representation for all provinces regardless of population; and (3) that is *effective* in the representation of provincial and territorial interests. We also heard a proposal for a second chamber that would be elected not by popular vote, but by the legislatures of each province. Joining these provincial members would be representatives of the territories and the First Nations.

A few witnesses and Conference delegates expressed support for a reformed appointment process. One suggestion raised before the Committee would leave the method of selecting Senators to the discretion of each province. Another suggestion called for a mixed chamber of elected Senators, and appointees of the Governor General who would represent various communities.

We believe that the upper chamber of Parliament must be an elected body; otherwise the goals of democratic legitimacy and accountability to the people of Canada will not be met. After considering various models for an electoral system, we have concluded that members could be elected either (a) directly in a separate

election to be held in conjunction with a provincial or territorial election; or (b) indirectly under a system of proportional representation based on provincial or territorial election results.*

Under both models, the members of the second chamber would be chosen on a more or less continuous basis. Every provincial and territorial election across the country would bring with it either a direct or indirect election for this new chamber.

By way of explanation, the model of indirect election would work as follows:

- Voters would continue to cast ballots in provincial elections as at present.
- Seats in the second chamber would be allocated in proportion to the popular vote received in the province by those parties contesting the election in question. Thus, if a party received 30% of the vote, it would be entitled to 30% of the province's seats in the second chamber.
- The parties would then select the individuals who would fill these seats. One way of doing so might be through the preparation of a list of second chamber candidates by each party that would be available to the public prior to the election. If the election results translated into three seats (eg. 30% support for a particular party in a province entitled to 10 seats), the top three names on the party list would be selected.

Both electoral models respond to certain needs. Direct election, for example, would give the winning candidate the political authority that is derived from having a direct mandate to represent his or her constituents. But indirect election avoids the confusion of two directly elected chambers; the supremacy of the House of Commons is less likely to be undermined. The timing of the elections under both models is designed to reduce the likelihood of the second chamber simply being a mirror of the House of Commons. It also reinforces the second chamber's role of protecting provincial and territorial interests in Parliament.

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* Our proposed method of indirect election would not apply to the Northwest Territories because of the absence of party representation in its Legislative Assembly.

Representation

Current provincial and territorial representation in the Senate is based roughly on the principle of regional equality. Four regions -- Ontario, Quebec, the four Western provinces, and the three Maritime provinces -- are each represented by twenty-four Senators. In addition, Newfoundland has six Senators and the territories one each.

Several submissions favoured a more equitable distribution of provincial and territorial seats. In particular, we heard of the need to balance Central Canada's numerical domination of the House of Commons with a new method of distributing Senatorial seats. This need was expressed most forcefully during some of our meetings outside the province. Inequities in representation in the Senate between Western and Atlantic provinces were also pointed out to us. New Brunswick and Nova Scotia, for example, presently have almost twice as many seats (10 each) as do Alberta and British Columbia (6 each), although they have much smaller populations.

Proposed formulas for improving equitability ranged from a revised system of *regional* equality where, under one model, the West would be divided into Pacific Canada and Western Prairies regions to a system of *provincial* equality. (Other formulas, including one based on the representation of Länder in the German Bundesrat, were also put forward.) The concept of provincial equality was promoted especially in Alberta and Newfoundland. We were told that the democratic principle, the equality of citizens, was reflected in the makeup of the House of Commons and that the federal principle, the equality of the provinces, must be recognized in the Senate. In the two Conference workshops on the Senate, delegates acknowledged the need for more equitability; none, however, expressed support for equal provincial representation.

We agree with the goal of a more equitable distribution of seats in a new second chamber. We also agree with the statement in the federal proposals that "the

reality of contemporary Canadian politics is that *provinces and territories, and not regions,* are basic to our sense of community and identity." [italics in original] Accordingly, we support the weighting of representation in favour of the less populous *provinces and territories*. Presently, one province has four seats, five have six each, two have ten each, and two have twenty-four each. As noted earlier, the territories have one each. This variation must be diminished, but should it extend to the point of equal provincial representation? We have considered various objections to the concept of "equality" in this new chamber -- for instance, that the concept does not adequately take into account the nearly 80-fold difference in provincial populations, nor the fact that Ontario has over one-third of Canada's population. Another concern is that it is not realistic to expect that Quebec, with its enormous proportion of the French-speaking population of the country, could accept a reduction to 10% of the second chamber's membership. However, if the second chamber's powers are changed in the way we recommend, then it is possible that a more equitable distribution of seats might indeed extend to "equal."

Powers

The issue of powers is not one which we have had an opportunity to study in great depth. It raises among other things: complex questions pertaining to absolute and suspensive vetoes; distinctions between money bills, language legislation, and other legislation; the issue of the ratification of appointments; and what role a second chamber should play in the passage of constitutional amendments.

The powers of a reformed second chamber were only addressed in a very general way at the Conference. Workshop delegates concluded that the preeminent federal institution is the House of Commons. They did not wish that preeminence to be undermined by a reformed Senate.

During the hearings, most of the submissions on the question of powers were also quite general, supporting the principle of the supremacy of the Commons. A few

submissions, however, were very specific. They included three different Triple-E models which were generated by the Canadian Committee for a Triple E Senate, a legislative committee in Alberta, and the Government of Newfoundland, respectively as well as models labelled the "House of the Federation" and the "Council of the Canadian Economic Union" by their proponents.

During our deliberations, we also considered the federal proposals on the powers of a reformed Senate. They would require the approval of both the Senate and the House of Commons before bills could become law, but subject to two exceptions. On matters of national importance, the Senate would have a six-month suspensive veto only. In addition, it would have no legislative role in relation to appropriation bills and measures to raise funds. The proposals would furthermore give the Senate the power to ratify certain appointments and would create special voting rules for matters of language and culture. During our hearings on the federal proposals, we received few submissions on these proposed powers. Most focused instead on the issues of selection and representation.

We believe strongly that the ultimate supremacy of the House of Commons must not be undermined. As stated in the federal proposals, "the House of Commons should remain the primary legislative body for Canada." This principle means that the Commons must be the sole confidence chamber. Legislative defeat in the second chamber, then, should not lead to the resignation of the government.

Apart from the question of confidence votes, how should the second chamber's legislative role be defined? Currently, all bills initiated and passed by the House of Commons must proceed through a second chamber before becoming law. We propose a continuation of that practice, but with some changes. Upon being introduced in the new second chamber, a bill which has been passed by the Commons should be subject to either an absolute or suspensive veto. This veto power would work as follows:

- *Bills concerning shared-cost programs.* In the case of legislation introducing or changing shared-cost programs in areas of exclusive

provincial jurisdiction, the second chamber would have an absolute veto whereby the legislation could be defeated.

However, if Recommendation 20 is implemented, the provinces would have sufficient power over these programs and there would be no need for the granting of such a veto. Recommendation 20 stipulates that the federal government should not introduce or change shared-cost programs in areas of exclusive provincial jurisdiction without the approval of at least seven provinces with 50% of the population. In addition, the recommendation provides for opting out with compensation if the province establishes a program which meets the objectives of the new program or the changes.

- *All other bills.* In the case of all other legislation, the second chamber should have a suspensive veto whereby it could delay, but not defeat, a bill. If the new chamber (a) failed to approve a bill or (b) approved it with amendments, the bill would be returned to the House of Commons for further debate and an additional reading. The Commons could choose to accept or reject any amendments made by the second chamber.

The suspensive veto would work in conjunction with the possible changes to the division of powers stated in Recommendations 17-19 and vary in length according to the nature of the legislation involved. The proposed review of the division of powers, for instance, might lead to several powers being made concurrent, with provincial or federal paramountcy. The duration of the suspensive veto would be longer if the bill in question fell under the category of provincial, as opposed to federal, paramountcy.

It is our view that a standing joint committee could be established by the second chamber and the House of Commons to monitor carefully the fulfillment of national standards under the enhanced s. 36 of the Constitution Act, 1982, with jurisdiction to recommend remedial action to both levels of government. We consider this joint committee to be a more appropriate monitoring body than a committee of second chamber members only. The latter type of committee would consist of members elected to represent provincial and territorial interests and yet would be scrutinizing the actions of both the federal and provincial levels of government.

We note that all members of this joint committee would have been elected, thereby adding to the legitimacy of the monitoring function. As well, the members would already be familiar with issues raised by the Social Charter concept as a result of their legislative responsibilities. It is possible that the mandate of this joint committee might extend to other federal-provincial matters.

We recommend that:

24. ***The Senate should be replaced by a new second chamber of Parliament whose mandate would include the effective representation of provincial and territorial interests in national decision-making.***

25. ***The House of Commons must remain the sole confidence chamber in Parliament. Legislative defeat in the second chamber should not lead to the resignation of the government.***

26. ***The second chamber must be an elected body. Members could be elected either (a) directly in a separate election to be held in conjunction with a provincial or territorial election; or (b) indirectly under a system of proportional representation based on provincial or territorial election results. This latter model would work as follows:***

    - ***Voters would continue to cast ballots in provincial and territorial elections as at present.***

    - ***Seats in the second chamber would be allocated in proportion to the popular vote received in the province or territory by those parties contesting the election in question. Thus, if a party received 30% of the vote, it would be entitled to 30% of the province's or territory's seats in the second chamber.***

    - ***The parties would then select the individuals who would fill these seats. One way of doing so might be through the preparation of a list of second chamber candidates by each party that would be available to the public prior to the election. If the election results translated into three seats (eg. 30% support for a particular party in a province entitled to 10 seats), the top three names on the party list would be selected.***

27. ***Candidates should not be required to meet any property qualifications.***

28. ***The distribution of provincial and territorial seats in the second chamber should be made more equitable than is currently the case in the Senate. The concept of equitability might even extend to equal provincial***

representation, if our recommendations on the powers of the second chamber are adopted.

29. *All bills passed by the House of Commons should be introduced in the second chamber and be subject to either an absolute or suspensive veto as follows:*

- *In the case of bills introducing or changing shared-cost programs in areas of exclusive provincial jurisdiction, the veto power should be absolute. However, if Recommendation 20 on these programs is implemented, this veto power need not be granted.*

- *In the case of all other bills, the second chamber should have a suspensive veto. If this chamber (a) failed to approve a bill or (b) approved it with amendments, the bill would be returned to the House of Commons for further debate and an additional reading. The Commons could choose to accept or reject any amendments made by the second chamber. This veto would work in conjunction with the possible changes to the division of powers stated in Recommendations 17-19 and vary in length according to the nature of the bill in question.*

30. *A standing joint second chamber - House of Commons committee could be established to monitor carefully the fulfillment of national standards under the enhanced s. 36 of the Constitution Act, 1982. This joint committee could have jurisdiction to recommend remedial action to both levels of government. Further study is required to determine if the mandate of the committee could extend to other federal-provincial matters.*

Supreme Court of Canada

Apart from the comments at the Conference workshops on national institutions, few submissions were made on the Supreme Court of Canada. Nonetheless, the Committee still feels that the reform of the Supreme Court deserves attention. The Court has significant powers which affect the citizens of Ontario, plus their government and legislature. For example, it can strike down legislation which contravenes the Charter of Rights as well as legislation which does not come within the authority of the government which enacted it (a question concerning the division of powers).

The submissions on the Supreme Court focused on two issues: (1) the composition of the Court; and (2) the process of appointing the justices. Currently, under the Supreme Court Act, the Court is comprised of nine judges, at least three of whom must be from Quebec. By convention, the remaining judges are appointed as follows: three from Ontario, two from the Western provinces, and one from the Atlantic provinces. This kind of regional composition enhances the sensitivity and acceptability of the Court's opinions.

Both Conference workshops endorsed the three-judge requirement from Quebec as necessary because of the province's Civil Code. In addition, one workshop saw symbolic value in the guarantee; it was another element of the distinctiveness of Quebec within Confederation.

We recommend the constitutionalization of this guarantee. As well, consideration should be given to entrenching in the Constitution the convention whereby other parts of Canada are represented on the Supreme Court. Entrenchment, however, must include the possibility of selecting judges from the territories.

On the question of a selection procedure, the Supreme Court Act stipulates that the nine judges shall be appointed by the Governor in Council, that is, the federal Cabinet. No role is assigned to the provinces and territories in the appointment process. The recent federal proposals, though, would provide for such a role. In the case of a Supreme Court vacancy, the Minister of Justice would ask the appropriate Minister(s) of Justice and Attorney(s) General to submit a list of five nominees within 90 days. The federal government would then appoint "acceptable" individuals from these lists.

We consider that this proposal provides an appropriate vehicle for provincial and territorial input. We note as well that both Conference workshops on the Supreme Court supported a provincial role in the nominating process.

We believe that when selecting the five nominees, provincial and territorial governments should make efforts to find candidates representative of the diversity of the province or territory in question. At the same time the federal government, when appointing the justices, should seek to make the court as representative of the regional and social makeup of Canada as possible. We recommend that:

31. ***The statutory requirement of three judges from Quebec on the Supreme Court of Canada should be entrenched in the Constitution. As well, consideration should be given to entrenching the convention whereby three judges on the Court are appointed from Ontario, two from the Western provinces, and one from the Atlantic provinces. Entrenchment, however, must include the possibility of selecting judges from the territories.***

32. ***The Constitution should be amended to provide that in the case of a vacancy on the Supreme Court of Canada, the federal Minister of Justice should ask the appropriate provincial or territorial Minister(s) of Justice or Attorney(s) General to submit a list of nominees. Where an appointment is made to the Court, the federal government should appoint a person whose name has been submitted on such a list and who is acceptable to the federal government.***

Electoral System and the Political Process

The reform of the electoral and political system was not extensively addressed during our consultation process. Such reforms are only partially constitutional in nature. For example, the formula for representation in the House of Commons is found in ss. 51, 51A, and 52 of the Constitution Act, 1867, but neither that Act nor the Constitution Act, 1982 contain any provisions on the question of party discipline and free votes. We note that our mandate, which requires us to report on the "social and economic interests and aspirations" of the people of Ontario within Confederation as well as "what form of Confederation" can most effectively meet those aspirations, does not make electoral and political reform a major issue for the Committee. We wish to point out as well that the terms of reference of another Committee, the Legislature's Standing Committee on the Legislative Assembly, explicitly empower it to review and report on "the Standing Orders of the House and the procedures in the House and its committees . . ."

(Standing Order 104(i)) However, we do want to comment briefly on what we have heard.

On the question of reforming the current "first-past-the-post" electoral system for the House of Commons and provincial legislatures, we did not hear any consensus. Some witnesses favoured a type of proportional representation to achieve a better correlation between election results and the preferences of voters. As stated in the Interim Report, it was felt that in a three-or-more party system, a party frequently won a majority government with less than 50% of the votes. One proposal that we received looked at proportional representation from a very different perspective. It held that there should be a basic guarantee of proportional representation for women and men of all races and ethnicity in legislatures (as well as courts, tribunals, and the public service). On the other hand, we also heard support for the current "first-past-the-post" electoral system. For instance, in the report of the workshop which looked at the issue, we were told that there was no enthusiasm at all for moving towards a system of proportional representation.

During our hearings and the Conference, several witnesses and delegates expressed a real sense of alienation from, and lack of confidence in, the political process. A common concern was the need for more responsiveness and accountability from legislators at both the federal and provincial levels. In this regard, we heard many suggestions for the loosening of party discipline and the holding of more free votes. Several witnesses specifically endorsed the federal government's commitment to give MPs more free votes and to reduce the application of votes of confidence. There was also some support, but at the same time much division, on the use of referenda on major policy issues and a right of recall between elections.

At the Conference, both workshops agreed on the need for a better balance between party discipline and free votes on certain types of issues. We accept this goal as valid; but as was acknowledged in the workshops, there are inherent

limitations to the notion of free votes. These limitations include the accountability of parties to the electorate and the concept of responsible government whereby the government must enjoy the confidence of a majority in the legislature. It should also be remembered that the electorate expects legislators to exercise judgment when making policy decisions. This expectation means that although it is reasonable to expect that one's wishes will be considered, no person has the right to expect that his/her wishes will always be followed.

We propose that the Standing Committee on the Legislative Assembly conduct a detailed study of possible reforms to the electoral and political system, attaching importance to such goals as representativeness and accountability. We also believe that Committees of the Legislature, when examining major policy issues, should consider our consultation process as a possible model. This model involves extensive public hearings not only in Toronto, but in all parts of the province. It includes a conference of delegates representative of the diversity of Ontarians who come together to talk and listen to each other and to foster the reaching of a consensus. Our model furthermore involves meetings in other provinces and the territories where the issues have a national dimension or where the experiences of other jurisdictions are of relevance to Ontario.

We recommend that:

33. ***Pursuant to Standing Orders 104(i) and 105 of the Legislative Assembly of Ontario, the Standing Committee on the Legislative Assembly should conduct a detailed study of possible reforms to the electoral and political system, attaching importance to such goals as representativeness and accountability.***

PROCESS OF CONSTITUTIONAL REFORM

Throughout this report we have recommended various substantive changes to the Constitution. But how should these changes be made? In general, how should the Constitution be amended in this and future rounds?

Prior to 1982, the Constitution contained no general amending formula and amendments had to be enacted by the United Kingdom Parliament. In 1982 Canada obtained a domestic amending procedure which requires the passage of constitutional resolutions by Parliament and provincial legislatures. This process is prescribed in the Constitution Act, 1982 and makes no reference at all to such forms of public participation as hearings, constituent assemblies, or referendums.

The question of the process for amending the Constitution was raised during all phases of our deliberations. At the beginning of our interim phase, the Ontario Government released its discussion paper Changing for the Better: An Invitation to Talk about a New Canada in which there was no specific mention of the process issue. As we heard at one meeting, the government's intention in omitting the issue was to foster "discussion and ventilation of priorities and values and views about the fundamentals rather than the technicalities of the Constitution" which would come later. Nonetheless, witnesses in February and March wished to speak about the process of reform and a separate section was devoted to the issue in our Interim Report.

There can be little doubt that the question of an appropriate amending process is quite complex. As a result, most of the submissions from the general public focused on principles, rather than on the formulation of detailed schemes. The most agreed-upon principle -- that of the need for meaningful public participation -- is discussed next.

Development of Constitutional Amendments

Principle of Public Participation

Public dissatisfaction with the current amending process was succinctly described in one Conference workshop report as follows:

> . . . there is widespread public dissatisfaction with the existing process of constitutional reform. People feel that they are shut out of the process. The example most delegates mentioned was the Meech Lake Accord. The public was not consulted about the terms of the Accord while it was being drafted, not educated about it when it was released, and resented being told that it was a "take it or leave it" proposition.
>
> . . . Delegates agreed that until a constitutional process is devised which is genuinely participatory, ordinary Canadians will not feel a sense of "ownership" of the Constitution.

In this chapter one of our goals is to answer the question "How can Canadians obtain that sense of ownership?" By way of prefatory remarks, we believe that two methods of helping Canadians to do so have been pursued by this Committee: (1) the holding of public hearings; and (2) the sponsoring of a conference on the principles of constitutional changes, both taking place *prior to the introduction of any legal text (in the form of a constitutional resolution) in Parliament or a provincial legislature.*

We have little doubt that the impact of public hearings will be all the greater the earlier they are held in the amending process. We note that public hearings were held in several jurisdictions on the Meech Lake Accord, but generally only after that agreement had assumed the form of a constitutional resolution.

Whenever held, public hearings must be as inclusionary as possible. Efforts should be made to ensure that women, Aboriginal peoples, linguistic minorities,

persons with disabilities, visible minorities, and ethnocultural groups can participate in a meaningful way.

The Committee also believes that public hearings are an essential part of any legislative ratification process. Thus, they should take place in each jurisdiction when specific constitutional amendments are being debated by legislators.

We recommend that:

34. ***The Standing Orders of the Legislative Assembly of Ontario should be amended to make mandatory the holding of public hearings on any constitutional resolution introduced by the Government of Ontario in the Assembly. As well, a prior set of hearings should be required on any proposed constitutional amendment initiated by the Governments of Canada or Ontario, or to which the Governments of Canada or Ontario have given their agreement in principle.***

35. ***The Legislative Assembly of Ontario should establish a Standing Committee on the Constitution, as recommended in the 1988 Report of the Select Committee on Constitutional Reform and in the 1990 Report of the Select Committee on Constitutional and Intergovernmental Affairs. This new Standing Committee would conduct the hearings mandated under Recommendation 34. It would also be empowered to study constitutional matters on which the Governments of Canada and Ontario had yet to express a position.***

Apart from more effective public hearings, what methods might enhance public confidence in the reform process? Many witnesses and delegates responded by endorsing a constituent assembly and/or a referendum. These concepts are outlined below.

Constituent Assembly

The Committee heard widely varying views on the concept of a constituent assembly, which we define as a group of individuals, selected to represent the interests of the population at large, who are convened to consider and develop constitutional proposals.

One model raised before the Committee called for two main categories of participants: delegates from political parties in power and in opposition, and delegates from interest groups whose aspirations are directly affected by the present Constitution. Under this model, the assembly would consider basic reforms to Canadian federalism such as the division of powers, Aboriginal self-government, and "reinforced" linguistic duality. It would also determine a permanent constitutional amending process. The findings of the assembly would be ratified through the current process prescribed in the Constitution Act, 1982.

Another model presented to us held that there should be a constituent assembly composed of representatives elected specifically for the purpose. Under one variation of this model, there would be guaranteed representation in the assembly of "equality delegations" representing women, minority francophones, visible minorities, racial and ethnocultural minorities, people with disabilities, lesbians and gay men, and the economically disadvantaged.

Models such as the ones just described were designed to enhance public participation in the reform process. They differed in details, but all sought to avoid the presentation of a constitutional *fait accompli* by first ministers.

Although these and other models were supported before the Committee, a number of questions about the concept of a constituent assembly surfaced. Several Conference delegates, for example, asked how members of the assembly would be selected so as to make it genuinely representative of Canadian society. There was also the question as to whether the assembly would create a proposal or simply consider one proposed by governments or some other authority. In this regard, one workshop report identified the following concern:

> If the delegates to such an assembly are actually responsible for formulating a constitutional package, compromise will be necessary. But this would mean that the delegates will have to abandon or compromise the promises they made to the people who selected them for the job. This is precisely the

> feature of the existing political system which leads many people to argue it is not really representative.

Another concern we heard was whether or not Parliament and the legislatures would be bound by the assembly's decisions. The question was asked at the Conference: "Is this [binding authority for the assembly] democratic or practical?"

Underlying the comments of witnesses and delegates on the assembly concept was the kind of balance they felt should exist between, on the one hand, public consultation and, on the other hand, the exercise of leadership by elected legislators. The nature of that balance was also at the core of the submissions on referendums.

Referendums

By the term "referendum" we mean a consultation of the people about a specific measure. A more precise definition, which is found in Webster's Third New International Dictionary and which is cited in the Beaudoin-Edwards Committee's discussion of the amending process, reads as follows:

> the principle or practice of submitting to popular vote a measure passed upon or proposed by a legislative body or by popular initiative.

Although not explicitly stated in the definition, a referendum may be consultative or binding. If consultative, it would play a role in formulating final constitutional amendments. By way of illustration, the Beaudoin-Edwards Committee report recommended the enactment of legislation enabling the federal government to hold a consultative referendum "either to confirm the existence of a national consensus or to facilitate the adoption of the required amending resolutions." A binding referendum, on the other hand, might require a legislative body to act in a particular way. It could also serve as a ratification mechanism by which the ratification of amendments would be done directly by the people of Canada, and not by Parliament and the provincial legislatures. One proposal put forward

before the Committee for such a referendum prescribed the following ratification formula: (1) majority support in eight provinces; (2) support of 60% of all Canadians who vote; and (3) support of at least 40% of the people in every province.

There was certainly no consensus during our hearings and Conference on the appropriateness of constitutional referendums, whether they be national or provincial/territorial in scope. Opinions in one Conference workshop, for example, fell into three different categories: one group favoured a referendum only to break an impasse on a committee or among governments; another suggested they could be used periodically to ratify and legitimize parts of a constitutional package as they were agreed upon by a committee or by governments; and one delegate supported a referendum to ratify a complete package worked out among governments after a period of public consultation.

During our meeting in British Columbia, we learned that in 1991 both the Social Credit Party and the New Democratic Party had supported the passage of the Constitutional Amendment Approval Act. This Act stipulates that before the government introduces a constitutional resolution in the Legislature, it must conduct a referendum on the matter.

The other referendum legislation that was highlighted to us during the hearings was Quebec's Bill 150, An Act respecting the process for determining the political and constitutional future of Québec. This is the Act which requires that a referendum on sovereignty be held between June 8-22 or between October 12-26 this year. In the words of one witness, it has made the timetable for constitutional change "incredibly urgent."

We have considered the arguments in favour of referendums, including:

- they are said to be the most democratic amending procedure, giving the people a direct say on constitutional matters. We were told that in the

case of binding referenda, they are the only guarantee that the wishes of the people will be respected;

- they engender the feeling that the Constitution belongs to the people;
- by requiring direct public participation, people would become better informed; and
- they would make people more eager to participate in constitutional discussions.

We have also considered some of the concerns about the referendum concept, such as:

- it might weaken representative government and the power of elected officials. Political leaders could be seen as abdicating their responsibility;
- it requires an all or nothing response to sometimes complex proposals. Thus, for example, those who disagree with a single element of a proposal might feel compelled to reject the whole thing;
- it can accentuate divisions and polarize debate; and
- the votes of minorities might be overwhelmed by the majority.

The latter concern about the potential abuse of the rights of minorities by the majority was expressed in both Conference workshops on process. Other concerns of delegates included the non-binding nature of a consultative referendum, the cost of holding the vote, and whether or not an adequate public education campaign would be possible.

Without making any recommendations on the appropriateness of a referendum or constituent assembly, we wish to affirm that a consultation process can validly assume several forms. The process must not be seen as requiring one specific model only; however, it must contain ingredients of accessibility and fairness.

Approval of Constitutional Amendments

As mentioned above, the Constitution Act, 1982 prescribes a legislative model for the ratification of constitutional amendments -- that is, amendments must be passed by provincial legislatures and Parliament. We believe that the legislative model strikes an appropriate balance between consultation and leadership and should be retained in some fashion. We also believe that as part of the consultation component, public hearings should be mandatory prior to the passage of a constitutional resolution. It is essential that Canadians have an opportunity to speak out before an amendment becomes law. A recommendation to this effect was made earlier.

Apart from the mandating of public hearings, what changes should be made to the legislative ratification process? More particularly, should the so-called "7/50" formula and the unanimity formula be modified?

The Beaudoin-Edwards Committee report acknowledged that "given the range of possible alternatives to the current amending procedure and the range of considerations which needs to be addressed, the task of evaluating amending formulas is intimidating." As well, it stated that "amending procedures strike a centrally important constitutional balance, the balance between resistance to change and receptivity to change." Notwithstanding the "intimidating" nature of the exercise, in the discussion which follows we briefly analyze legislative amending formulas, mindful of the need to strike that constitutional balance. Because very few submissions discussed these formulas our review is limited in scope. It is not intended to be comprehensive.

General Amending Formula

As pointed out in the Interim Report, several amending formulas are prescribed in the Constitution Act, 1982. The so-called "7/50" formula requires the consent of Parliament and at least two-thirds of the provinces (that is, at least seven

provinces) having at least 50% of the population of all the provinces before an amendment can become law. Known as the general amending formula, it applies to all amendments not specifically provided for in the other amending formulas, plus certain specified matters, such as: Senate reform; the Supreme Court of Canada, other than its composition; and the establishment of new provinces. We note that the federal proposals support the transfer of these designated matters to the unanimity formula (with the exception of provincehood for the territories). Provinces may opt out of certain amendments falling under the 7/50 formula and in some circumstances receive compensation. A three-year time limit applies to the passage of these amendments.

Proponents of this formula contend that it recognizes the equality of the provinces. No province has a veto on constitutional change and every province has the opportunity of opting out of some amendments. The formula also requires some kind of national support for an amendment to pass, but without the rigidities of unanimity. At a minimum, one Western province, either Ontario or Quebec, and one Atlantic province must support an amendment if it is to pass.

A criticism of the formula is that it permits change to occur even when opposed by three provinces which, in theory, might have 49.9% of the population. A threshold higher than 50% has thus been suggested. Another criticism that has been made is that the formula does not recognize the distinctiveness of Quebec.

Unanimity Formula

The other major formula -- that of unanimity -- requires the consent of Parliament and all provinces to amendments in certain areas, such as: the use of the English and French language; the composition of the Supreme Court of Canada; and changes to the amending formulas themselves. No time limit is prescribed for the passage of these amendments.

Similar to the 7/50 formula, this formula can be seen as a recognition of the equality of the provinces. Every province regardless of size can protect its interests on fundamental matters. On a more specific level, Quebec has a guarantee that language provisions cannot be amended without its consent. Unanimity also creates an imperative for the development of consensus.

But how easily can that consensus be achieved? The principal objection to unanimity is the unwieldiness of the formula. Any province can block constitutional changes even if it represents only a small fraction of the national population.

Regional Formula (Beaudoin-Edwards model)

The Beaudoin-Edwards Committee recommended that in general the 7/50 and unanimity formulas be replaced by a new formula of Parliamentary and regional vetoes. Constitutional amendments would require the approval of Parliament and each of four regions of Canada, defined as follows:

- at least two of: New Brunswick, Newfoundland, Nova Scotia, and Prince Edward Island;
- Ontario;
- Quebec; and
- at least two of: Alberta, British Columbia, Manitoba, and Saskatchewan, representing at least 50% of the population of this region.

It was the view of the Beaudoin-Edwards Committee that this formula achieved a balance between the equalities of province and person. (The latter equality deals with the constitutional weight of individuals.) In addition, it was felt that the formula struck a more consistent balance between resistance to change and receptivity to change than was currently the case, even though it preserved the unanimity requirement for certain essential matters. The distinctiveness of Quebec was recognized in the form of a veto for the province.

One criticism of the proposal might be its inconsistency with the principle of the equality of the provinces, depending on how that principle is defined. Ontario and Quebec are each given a veto, whereas other provinces must act in concert to block an amendment. The Beaudoin-Edwards Committee, however, defined the principle of equality of the provinces as permitting variations among the provinces in specific roles and powers, according to their particular needs and for the purpose of furthering overall equality.

Another criticism of the proposal was levelled by the sole British Columbian on that Committee who, in an addendum to the report, argued that British Columbians had interests distinct from the prairie region. She urged the acceptance of a fifth region, British Columbia.

The concept of a regional Canada at all as a basis for an amending formula was strongly opposed by one witness from Manitoba. He felt that it showed an "arrogant and ignorant disregard" for the enormous differences that existed within the so-called regions.

A regionally-based formula similar to that of Beaudoin-Edwards (the difference being that the two Atlantic provinces would have to contain at least 50% of the region's population) was endorsed by one group for most amendments, including those designed to protect and promote fundamental values. However, the group felt that amendments which would reduce such protection should require unanimous consent. Some of the fundamental values it listed were gender equality, native rights, language rights, and multiculturalism.

Evaluation

Our assessment of amending formulas has led us to conclude that there is no perfect formula which will be unanimously supported across the country; rather, the goal must be the reaching of an effective compromise. We believe that the

Beaudoin-Edwards formula best achieves that compromise for the following reasons:

- It strikes a proper balance between the need for stability and the need for change. As stated in that Committee's report, the formula largely avoids the combination of too much protection (unanimity) and too little protection ("7/50");

- It adequately takes into account population differences among the provinces -- that is, the constitutional weight of individuals;

- It acknowledges clearly the need for some kind of national support for the ratification of amendments; and

- It is not inconsistent with the doctrine of the equality of the provinces. That doctrine does not preclude variations in provincial roles or powers, according to the particular needs of the people in any individual province. The Beaudoin-Edwards formula recognizes particular needs by, for example, its reflection of Quebec's distinctiveness in the form of a veto and by not marginalizing Prince Edward Island simply because it is Canada's smallest province. The absence of a 50% population minimum for the Atlantic provinces means that Prince Edward Island is not required to join with at least two other provinces in order to gain approval of its position by the Atlantic region.

In addition, we agree with the Beaudoin-Edwards Committee that the maximum period for the ratification of proposed constitutional amendments should be reduced to two years. If our other recommendations on the reform process are implemented, such as the one on early public hearings, it would be neither appropriate nor necessary to set aside three years for ratification. We did consider the possibility of a one-year limit, but feel that more time is required, especially considering the length of time it can take for a bill to pass through a legislature. Sufficient time must also be left for any compromises to emerge.

We have concluded that this new formula should not apply to the question of provincehood for the territories. During our meetings in the territories, it was impressed upon us that there should be a return to the pre-1982 formula whereby the formal decision to create new provinces rested solely with the people of the territory or region in question and the federal government. We agree that this

formula must be readopted. Provinces should be consulted, but they should not have a final say on the constitutional status of the territories.

Another exception to the general formula should apply to constitutional amendments directly affecting Aboriginal peoples. As recommended by Aboriginal witnesses, such amendments should require the consent of Aboriginal peoples.

We recommend that:

36. In general, the amending formulas contained in sections 38, 41, and 42 of the Constitution Act, 1982 (the "7/50" and unanimity formulas) should be replaced by a requirement that constitutional amendments must receive the approval of Parliament and each of four regions of Canada, defined as follows:

- *at least two of: New Brunswick, Newfoundland, Nova Scotia, and Prince Edward Island;*
- *Ontario;*
- *Quebec; and*
- *at least two of: Alberta, British Columbia, Manitoba, and Saskatchewan, representing at least 50% of the population of this region.*

37. The maximum period for the ratification of proposed constitutional amendments should be two years, beginning on the day on which a proposal is ratified by either Parliament or a provincial legislature.

38. The creation of new provinces should require the consent only of Parliament and the legislature of the territory in question.

39. Any constitutional amendment directly affecting Aboriginal peoples should require their consent.

LIST OF RECOMMENDATIONS

1. *A Canada Clause should be developed, to be placed in the preamble to the Constitution.*

2. *The Canada Clause should address the values of Canada:*

   - *democratic participation by all Canadians, whatever their race, gender, religion, culture, or physical or mental disability; and concern for the well-being of all Canadians.*

   - *respect for the diversity of individuals, groups and communities; for the special responsibility of the province of Quebec to preserve and promote its distinct society; and for the contribution of people from many cultures and lands to the development of Canada;*

   - *the significance of the First Nations and their long stewardship of this land;*

   - *our historical traditions of a stable British parliamentary democracy, linguistic duality, and recognition and protection of cultural and linguistic minorities; and*

   - *the land itself, and respect for the natural environment.*

3. *The notwithstanding clause (s. 33) should be amended to provide that a declaration invoking s. 33 ceases to have effect after three years.*

4. *A review of the Charter of Rights and Freedoms should be undertaken with a view to identifying ways in which it could be improved. We believe all aspects of the Charter should be open to review, but recommend in particular that the following matters be examined:*

   Accessibility

   - *Whether there are methods to make the enforcement of the Charter more accessible?*

   Equality Rights' Guarantees

   - *Whether the Charter should state that the integration of persons with disabilities can best be achieved by their inclusion in the social, political and economic mainstream through the removal of barriers?*

- *Whether section 15 should be amended to provide that sexual orientation and language are prohibited grounds of discrimination?*

- *Whether section 27 should be amended to provide that it includes the multiracial, as well as the multicultural, heritage of Canada?*

Enforcement

- *Whether section 24 should be amended to clarify the remedies available to courts to rectify conditions deemed to be discriminatory or the causes of disadvantage?*

Language Rights

- *Whether the terms in which it is proposed to recognize Canada's linguistic duality are sufficient?*

- *Whether it should be possible to interpret the constitutional provisions regarding the English and French languages to include the sign languages of Deaf people?*

- *Whether section 14 should be amended to extend the right to the assistance of an interpreter to all legal proceedings?*

Property Rights

- *Whether section 7 should be amended to include a right to the enjoyment of property?*

5. *Governments should consider options through which the existence of barriers encountered by persons with disabilities could be periodically reviewed.*

6. *It should be recognized by all parties that access to resources and lands is an integral part of Aboriginal self-government.*

7. *The fiduciary responsibility of the federal government towards Aboriginal people should be affirmed. As part of this responsibility, we suggest that the Indian Act be revised, as negotiated with the Aboriginal people of Canada.*

8. *Representative Aboriginal organizations should be recognized as full participants in the constitutional process; Aboriginal people themselves will decide who represents them.*

9. *We endorse the "parallel process" of constitutional negotiations on Aboriginal issues, which includes formal consultation with urban Aboriginal people, women, youth and Elders.*

10. *We agree with the proposal of the federal government that a constitutional process to address Aboriginal constitutional issues and to monitor other important Aboriginal issues should be entrenched.*

11. *We also agree that the importance of the Aboriginal peoples to the identity and development of Canada should be recognized in the Canada Clause.*

12. *The inherent right of Aboriginal peoples to self-government within the Canadian constitutional framework should be recognized and this recognition should be entrenched in the Constitution without a deferral period.*

13. *When Aboriginal people have worked out a definition of self-government, provincial and federal governments must work with them to create a process, including a dispute resolution mechanism, to implement the right. This process could be entrenched in the Constitution.*

14. *Ordinary rights available to other Canadians under the Charter should be available to all Aboriginal people until the process of implementation of self-government is completed.*

15. *The distinct society clause as proposed by the federal government (the new section 25.1) should be considered a good basis for further discussion.*

16. *In order to recognize and affirm Quebec's distinct identity and special role within Canada,*

    - *a reference to Quebec's distinctness should be included in the proposed Canada Clause; and*

    - *a distinct society clause should be placed within the <u>Charter of Rights and Freedoms</u>.*

17. *A review of the existing division of powers should be undertaken with the following purposes:*

    - *To identify areas of overlap and duplication in the administration of powers. This part of the review should also identify gaps or areas in which there is some confusion over who has authority.*

    - *To identify areas of authority in which a different level of government might more effectively administer a power. Any*

transfer of authority in response to provincial needs must be accompanied by adequate fiscal resources.

18. *Powers should be redistributed in a flexible manner to address the important objectives of affirming the equitable treatment of all provinces, accommodating Quebec's needs to preserve and promote its distinct society, and maintaining a role for a strong federal government.*

19. *Specific mechanisms to reassign powers flexibly should be studied further. These mechanisms would include legislative delegation, making more powers concurrent with provincial or federal paramountcy, including certain bilateral agreements between governments in the Constitution, and the use of opting in or out of national shared-cost programs.*

20. *The federal government should exercise its spending power in areas of provincial jurisdiction within the following framework:*

- *The federal government should not introduce new Canada-wide shared-cost programs and conditional transfers in areas of exclusive provincial jurisdiction, without the approval of at least seven provinces representing 50% of the population. The same restrictions should apply to the introduction of changes to existing shared-cost programs.*

- *If a province chooses not to participate but establishes its own program which meets the objectives of the new program or the changes to a program, then it should receive reasonable compensation.*

- *This provision should be entrenched in the Constitution.*

21. *The concept of a Social Charter should be embodied in an expanded s. 36 of the Constitution Act, 1982 in the following terms:*

- *It should build on the principles found in s. 36, and uphold national standards and equitable access to programs involving but not limited to health care, education, social security and the environment;*

- *Its role should be to ensure the continued maintenance and development of our tradition of national standards in social programs.*

- *The principles of an expanded s. 36 could be monitored by a standing joint committee of the second chamber and House of Commons. This body could review proposed legislation or agreements or changes to existing agreements. It could also*

conduct systematic reviews of the adherence of governments to those principles.

- *Adherence to an expanded s. 36 would primarily rely on the moral and political pressure which would result from the public scrutiny of government policies this review process would provide. However, the options for implementing and enforcing an expanded s. 36 should be further explored. The provisions of an expanded s. 36 should not be judicially enforceable.*

22. *We support in principle efforts to reduce trade and other economic barriers within Canada.*

23. *The government of Ontario, in concert with other provinces and the federal government, should study further the details of the federal proposals regarding the economic union, seeking to clarify, negotiate and implement some of these measures through sub-constitutional means.*

24. *The Senate should be replaced by a new second chamber of Parliament whose mandate would include the effective representation of provincial and territorial interests in national decision-making.*

25. *The House of Commons must remain the sole confidence chamber in Parliament. Legislative defeat in the second chamber should not lead to the resignation of the government.*

26. *The second chamber must be an elected body. Members could be elected either (a) directly in a separate election to be held in conjunction with a provincial or territorial election; or (b) indirectly under a system of proportional representation based on provincial or territorial election results. This latter model would work as follows:*

- *Voters would continue to cast ballots in provincial and territorial elections as at present.*

- *Seats in the second chamber would be allocated in proportion to the popular vote received in the province or territory by those parties contesting the election in question. Thus, if a party received 30% of the vote, it would be entitled to 30% of the province's or territory's seats in the second chamber.*

- *The parties would then select the individuals who would fill these seats. One way of doing so might be through the preparation of a list of second chamber candidates by each party that would be available to the public prior to the election. If the election results translated into three seats (eg. 30% support for a particular party in a province entitled to 10 seats), the top three names on the party list would be selected.*

27. *Candidates should not be required to meet any property qualifications.*

28. *The distribution of provincial and territorial seats in the second chamber should be made more equitable than is currently the case in the Senate. The concept of equitability might even extend to equal provincial representation, if our recommendations on the powers of the second chamber are adopted.*

29. *All bills passed by the House of Commons should be introduced in the second chamber and be subject to either an absolute or suspensive veto as follows:*

- *In the case of bills introducing or changing shared-cost programs in areas of exclusive provincial jurisdiction, the veto power should be absolute. However, if Recommendation 20 on these programs is implemented, this veto power need not be granted.*

- *In the case of all other bills, the second chamber should have a suspensive veto. If this chamber (a) failed to approve a bill or (b) approved it with amendments, the bill would be returned to the House of Commons for further debate and an additional reading. The Commons could choose to accept or reject any amendments made by the second chamber. This veto would work in conjunction with the possible changes to the division of powers stated in Recommendations 17-19 and vary in length according to the nature of the bill in question.*

30. *A standing joint second chamber - House of Commons committee could be established to monitor carefully the fulfillment of national standards under the enhanced s. 36 of the Constitution Act, 1982. This joint committee could have jurisdiction to recommend remedial action to both levels of government. Further study is required to determine if the mandate of the committee could extend to other federal-provincial matters.*

31. *The statutory requirement of three judges from Quebec on the Supreme Court of Canada should be entrenched in the Constitution. As well, consideration should be given to entrenching the convention whereby three judges on the Court are appointed from Ontario, two from the Western provinces, and one from the Atlantic provinces. Entrenchment, however, must include the possibility of selecting judges from the territories.*

32. *The Constitution should be amended to provide that in the case of a vacancy on the Supreme Court of Canada, the federal Minister of Justice should ask the appropriate provincial or territorial Minister(s) of Justice or Attorney(s) General to submit a list of nominees. Where an appointment is made to the Court, the federal government should appoint*

a person whose name has been submitted on such a list and who is acceptable to the federal government.

33. *Pursuant to Standing Orders 104(i) and 105 of the Legislative Assembly of Ontario, the Standing Committee on the Legislative Assembly should conduct a detailed study of possible reforms to the electoral and political system, attaching importance to such goals as representativeness and accountability.*

34. *The Standing Orders of the Legislative Assembly of Ontario should be amended to make mandatory the holding of public hearings on any constitutional resolution introduced by the Government of Ontario in the Assembly. As well, a prior set of hearings should be required on any proposed constitutional amendment initiated by the Governments of Canada or Ontario, or to which the Governments of Canada or Ontario have given their agreement in principle.*

35. *The Legislative Assembly of Ontario should establish a Standing Committee on the Constitution, as recommended in the 1988 Report of the Select Committee on Constitutional Reform and in the 1990 Report of the Select Committee on Constitutional and Intergovernmental Affairs. This new Standing Committee would conduct the hearings mandated under Recommendation 34. It would also be empowered to study constitutional matters on which the Governments of Canada and Ontario had yet to express a position.*

36. *In general, the amending formulas contained in sections 38, 41, and 42 of the Constitution Act, 1982 (the "7/50" and unanimity formulas) should be replaced by a requirement that constitutional amendments must receive the approval of Parliament and each of four regions of Canada, defined as follows:*

- *at least two of: New Brunswick, Newfoundland, Nova Scotia, and Prince Edward Island;*
- *Ontario;*
- *Quebec; and*
- *at least two of: Alberta, British Columbia, Manitoba, and Saskatchewan, representing at least 50% of the population of this region.*

37. *The maximum period for the ratification of proposed constitutional amendments should be two years, beginning on the day on which a proposal is ratified by either Parliament or a provincial legislature.*

38. The creation of new provinces should require the consent only of Parliament and the legislature of the territory in question.

39. Any constitutional amendment directly affecting Aboriginal peoples should require their consent.